121-478

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1883.**

No. 379. 122

ANDREW N. BRAGG AND ROBERT R. SMITH, COPARTNERS, UNDER THE NAME OF A. N. BRAGG AND COMPANY, APPELLANTS,

*vs.*

ELEAZER T. FITCH AND EMILY M. FITCH, COPARTNERS, UNDER THE NAME OF W. AND E. T. FITCH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

**FILED OCTOBER 9, 1883.**

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1 W. & E. T. FITCH
*v.*
A. N. BRAGG & COMPANY. } In Equity.

To the honorable Supreme Court of the United States:

The appeal of Andrew N. Bragg and Robert R. Smith, copartners under the name of A. N. Bragg and Company, said defendants and appellants, respectfully showeth:

That on the 7th day of May, 1880, Eleazer T. Fitch and Emily M. Fitch, copartners under the name of W. & E. T. Fitch, said complainants, filed their bill of complaint in the circuit court of the United States for the district of Connecticut against the above-named defendants and appellants, alleging that on the 16th day of May, 1865, one Charles B. Bristol obtained letters patent of these United States, bearing that date, and numbered 47764, for a new and useful improvement in snap hooks, securing to him and his assigns the exclusive right to said improvement for the term of seventeen years from and after said date last mentioned; that on the 30th day of November, 1865, said complainants became the assignees and own-

2 ers of said letters patent by deed of assignment from said Bristol; and further alleging that said defendants had unlawfully infringed upon the exclusive rights secured to said complainants by said letters patent and said assignment thereof, and praying for a decree of injunction and account, as by reference to said bill of complaint will more fully appear.

And said defendants, on the 7th day of June, 1880, filed their answer to said bill of complaint admitting the issue of said letters patent to said Bristol, as alleged in said bill of complaint, not denying that the same were assigned to said complainants, but denying infringement; and also denying that said Bristol was the original and first inventor of the improvement described in said letters patent, and denying that the said improvement had patentable novelty, as by reference to said answer will more fully appear.

To which answer said complainants filed their replication, and the cause being at issue the parties proceeded to take testimony in support of their respective allegations, and at the April term of said circuit court, 1881, were fully heard, by their counsel, and at the September term, A. D. 1881, of said circuit court a decretal order for an injunction and account was rendered referring said cause for

3 the taking of the account to a master, and the cause was continued for the master's report, and thereafter at the September term, A. D. 1882, the master's report came in, to which said defendants made exceptions, which exceptions were duly argued before said circuit court; that at a stated term of said circuit court, held at New Haven on the fourth Tuesday of April, 1883, a final decree was made and pronounced in the cause, wherein it was ordered, adjudged, and decreed as follows:

"That said exceptions of the defendant be, and the same are hereby, overruled, and said report of the said master be, and the same is hereby, accepted; and that the complainants recover of the said defendants their damages, as stated and assessed in the report of the

said master, to wit, the sum of four thousand two hundred and fifty-nine dollars and seven cents, and their costs.

It is further ordered, adjudged, and decreed that the said defendants pay to the said complainants the sum of four thousand two hundred and fifty-nine $\frac{07}{100}$ dollars, and their costs in this suit, to be taxed, and that said complainants have execution therefor, and that the injunction heretofore granted in said cause be continued and made perpetual."

Whereupon said appellants appeal from the whole of said decree of said circuit court of the United States, and respectfully pray
4 that the decree of the said circuit court and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made reversing said decree, with costs, or such other decree as to said Supreme Court may seem fit.

Dated at Hartford, this 18th day of May, A. D. 1883.

WM. EDGAR SIMONDS,
*Solicitor and of Counsel for said Defendants and Appellants.*

[Endorsed:] No. 299. U. S. circuit court, district of Conn. W. & E. T. Fitch *v.* A. N. Bragg & Co. Appeal. Filed May 21, 1883. E. E. Marvin, clerk. Copy.

5 Supreme Court of the United States. In Equity.

W. & E. T. FITCH *v.* A. N. BRAGG & COMPANY.

Know all men by these presents that we, Robert R. Smith, of New Hartford, in the district of Connecticut, and Pliny Jewell, of Hartford, in said district, are held and firmly bound unto Eleazer T. Fitch and Emily M. Fitch, copartners under the name of W. & E. T. Fitch, in the sum of nine thousand three hundred and fifteen $\frac{28}{100}$ dollars ($9,315.28), to be paid to the said W. & E. T. Fitch, theirs heirs and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 21st day of May, 1883.

Whereas Andrew N. Bragg and Robert R. Smith, copartners under the name of A. N. Bragg and Company, the said defendants in the above-entitled cause, have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in said cause by the honorable circuit court of these United States for the district of Connecticut at its April term, 1883:

6 Now, therefore, the condition of this obligation is such that if the above-named A. N. Bragg and Company shall prosecute said appeal to effect and answer all costs and damages if they shall fail to make good their plea, and shall pay to said obligees the money decreed to be so paid in the final decree of said circuit court in this cause, including just damages for delay and costs and interest in this

appeal, then this obligation shall be void; otherwise it shall remain in force and virtue.

ROBERT R. SMITH. [L. S.]
PLINY JEWELL. [L. S.]

Taken and acknowledged before me, this 21st day of May, A. D. 1883.

[SEAL.] E. E. MARVIN,
*U. S. Com'r.*

UNITED STATES OF AMERICA, } ss:
*District of Connecticut,* }

HARTFORD, *May* 21, 1883.

Then personally appeared Robert R. Smith, of New Hartford, in said district, and being duly sworn, says: That he is one of the
7 obligors who subscribed the within bond, and that he is worth the sum of nine thousand three hundred and fifteen dollars and sixty-four cents over and above all his just debts and liabilities.

Before me—

E. E. MARVIN,
*U. S. Com'r.*

HARTFORD, CONN., *May* 25, 1883.

The foregoing bond is approved and the appeal allowed.

N. SHIPMAN,
*District Judge.*

8 United States Circuit Court, District of Connecticut. In Equity.

W. & E. T. FITCH *v.* A. N. BRAGG AND COMPANY.

By the Hon. Nathaniel Shipman, one of the judges of the circuit court of the United States for the district of Connecticut, in the second judicial circuit of the United States, to Eleazer T. Fitch and Emily M. Fitch, copartners under the name of W. and E. T. Fitch, Greeting:

Whereas Andrew N. Bragg and Robert R. Smith, copartners under the name of A. N. Bragg and Company, defendants herein, have lately appealed to the Supreme Court of the United States from the final decree lately rendered and entered in the above cause in favor of you, the said W. and E. T. Fitch, and have filed the security required by law: You are, therefore, hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, in the District of Columbia, on the second Monday of October,
9 A. D. 1883, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Hartford, in the district of Connecticut, in the second circuit, this 25th day of May, A. D. 1883.

N. SHIPMAN,
*One of the Judges for the Circuit Court for the District of Connecticut.*

Service accepted.
May 26, 1883.

JNO. S. BEACH,
*Solicitor for Complainants & Appellees.*

UNITED STATES OF AMERICA,
*District of Connecticut:*

NEW HAVEN, *May 26th*, 1883.

Then I served the within citation upon each of the within-named complainants, through their solicitor, John S. Beach, and I left with him true and attested copies of the same, he having accepted service.

Attest:

J. C. KINNEY,
*U. S. Marshal.*

Fees:

| | |
|---|---|
| 2 services | 4 00 |
| Travel, 38 | 4 56 |
| 2 copies | 1 00 |
| 3 indorsements | 45 |
| Carriage | 50 |
| | $10 51 |

10 *The Return of the Judges of the Circuit Court of the United States for the District of Connecticut to the Foregoing Appeal.*

The bill, answer, and pleadings, evidence, and proceedings whereof mention is therein made follow in this words, viz:

W. AND E. T. FITCH
*vs.*
A. N. BRAGG & CO. } In Equity.

Be it remembered that on the 7th day of May, 1880, there was filed in court a bill of complaint in the words and figures following, viz:

11 Circuit Court of the United States, District of Connecticut.

W. & E. T. FITCH *vs.* A. N. BRAGG & COMPANY.

To the honorable the judges of the circuit court of the United States for the district of Connecticut, sitting as a court of equity:

Eleazer T. Fitch and Emily M. Fitch, both of the city of New Haven, in the State and district of Connecticut, partners under the

firm [name] of W. & E. T. Fitch, bring this their bill against Andrew N. Bragg and Robert R. Smith, partners under the name of A. N. Bragg & Co., both of Pine Meadow, in the State and district of Connecticut, and thereupon your orators complain and say:

1. That heretofore and before the 16th day of May, 1865, Charles B. Bristol, of New Haven, Connecticut, became and was the original and first inventor of a new and useful improved snap hook, and duly applied for letters patent therefor, and after due proceed-
12 ings had letters patent of the United States were duly issued to himself and to William W. Hughes, William H. Andrews, and L. I. Bristol, all of the same place, his assignees, for the said invention, dated on said 16th day of May, 1865, numbered 47764, thereby granting to said Charles B. Bristol and the said Hughes, Andrews, and Bristol, their heirs, executors, administrators, and assigns, for the term of seventeen years thereafter, the full and exclusive right and liberty of constructing, using, and vending to others to be used the said invention, as described in the schedule annexed to and forming part of said letters patent, which said letters patent or a certified copy thereof complainant will produce as your honors shall direct.

2. That thereafter and on the 30th day of November, 1865, your orators became and were the assignees of said letters patent, and have ever since continued to be and now are the exclusive owners thereof, and of the invention secured thereby.

3. That the said Charles B. Bristol and the said Hughes, Andrews, and Bristol and their assigns have since the issuing of said letters patent been exclusively possessed of the same and of the invention thereby secured, and by themselves and their licensees have put the same in practice and made and sold snap hooks constructed according to the invention described in said letters patent, and the exclusive rights thereby secured have been generally respected.

4. But your orators are informed and believe, and therefore charge, that said defendants, since the date of said letters patents and since the assignment thereof to your orators at said Pine Meadow, have made, used and, sold great numbers of snap hooks made, ar-
13 ranged, constructed, and combined according to the principles, construction, arrangement, and combination set forth, shown, and described in said letters patent, without license or permission of your orators and contrary to and in infringement of his rights, and your orators fear that they will continue said infringement, to the great and irreparable damage of your orators.

2 Wherefore that the said defendants may answer the premises; may be enjoined from the practice of said infringement pending this suit; may be perpetually enjoined from said infringement; may account to your orator for the gains and profits made by them from the manufacture, use, and sale of articles infringing said right; and may pay damages to the complainant to the amount of five thousand dollars, and for other relief—

May it please your honors to grant to your orator—

1. A writ of injunction conformable to the prayer of this bill until further order of the court.

2. A writ of perpetual injunction.
3. A writ of subpœna.

Each in due and usual form and under usual penalties, and each directed to the said Andrew N. Bragg and Robert R. Smith.

And your orators will ever pray, etc.

ELEAZER T. FITCH,
*For Himself and W. & E. T. Fitch.*

JOHN S. BEACH,
*Solicitor and of Counsel.*

14 UNITED STATES OF AMERICA,
*District of Connecticut:*

Personally appeared Eleazer T. Fitch, one of the complainants in this bill, being duly sworn, deposes and says: That he has read the bill and knows the contents thereof, and the same (except the matters stated on information) are true, and the rest he believes to be true.

Sworn to before me, this fifth day of May, 1880.

JOHN B. MILLS,
*Notary Public.*

And on the same day a writ of subpœna issued out of court, directed to said defendant, which was duly served and returned, and which, with the return of service endorsed thereon, is in the words and figures following, viz:

15 [SEAL.] The President of the United States of America to the marshal of the district of Connecticut sendeth Greeting:

You are hereby commanded to summon Andrew N. Bragg and Robert R. Smith, partners under the name A. N. Bragg & Co., both of Pine Meadow, in the State and district of Connecticut, to appear before the judges of the circuit court of the United States of America for the district of Connecticut, in the second circuit, in equity, on the first Monday of June, 1880, wheresoever the said court shall then be, to answer a bill of complaint exhibited against said Andrew N. Bragg and Robert R. Smith in said court by Eleaser T. Fitch and Emily M. Fitch, both of the city of New Haven, in the State and district of Connecticut, partners under the firm of W. & E. T. Fitch, and then and there to answer the same, and to do and abide by what said court may order and decree in the premises.

Make due service and return at least twenty days before said first Monday of June, 1880.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Hartford, this 7th day of May, A. D. 1880.

E. E. MARVIN, *Clerk.*

The defendants are required to enter their appearance in said cause in the clerk's office of said court on or before the day at which

this writ is returnable, or by the rules of said court said bill will be taken as confessed.

E. E. MARVIN, *Clerk.*

JOHN S. BEACH,
*Complainants' Solicitor.*

16 UNITED STATES OF AMERICA, } ss:
*District of Connecticut,* }

TOWN OF NEW HARTFORD, *May 8th,* 1880.

Then I made service of this subpœna by leaving a true and attested copy thereof in the hands of each of the within-named defendants, A. N. Bragg and Robert R. Smith, in said town of New Hartford, in said district.

Attest: GEO. R. BILL,
*Deputy Marshal.*

Fees:

| | |
|---|---|
| Travel to serve & return, 76 m. | 4 56 |
| Services | 4 00 |
| Copies | 2 00 |
| | $10 56 |

17 And on the same day John S. Beach, Esq., entered his appearance for the plaintiffs, and on the 24th day of May, 1880, W. E. Simonds, Esq., entered his appearance for the defendants, and on the 7th day of June, 1880, the respondents filed in court their answer in the words and figures following, viz:

18 *The Answer of Andrew N. Bragg and Robert R. Smith, Defendants, to the Bill of Complaint of Eleazer T. Fitch and Emily M. Fitch, Complainants.*

United States Circuit Court, District of Connecticut. In Equity.

W. & E. T. FITCH *vs.* A. N. BRAGG & Co.

These defendants, saving and reserving to themselves all benefit of exceptions which may be taken to the errors of said bill of complaint, as to so much of said bill of complaint as they are advised it is material to answer unto, answering, say:

23 That they admit the issue of real or pretended letters patent numbered 47764, dated May 16, 1865, for an alleged improvement in snap hooks, as is charged in said bill of complaint, but these defendants do not know save by the allegations of said bill of complaint whether or not said complainants ever became the assignees and owners of said letters patent, and leave said complainants to make due proof thereof.

These defendants, on information and belief, deny that
19 said alleged invention has ever been in the exclusive possession of said complainants, and deny that said complainants' alleged rights in the same have ever been recognized or respected.

These defendants deny that they, or either of them, have ever made or used or sold any snap hooks constructed in accordance with said alleged invention; deny that they have ever infringed said letters patent or any rights of said complainants; and deny the right of said complainants to any injunction against these defendants, or to any accounting, profits, damages, costs, or other relief from or against these defendants.

These defendants, further answering on information and belief, deny that the said Charles B. Bristol mentioned in said bill of complaint was the original and first inventor of the alleged improvement set forth in said letters patent, and aver that said letters patent are illegal, null, and void, because that said alleged invention and improvement and all the material or substantial parts thereof were long prior to any supposed invention thereof known to and in use by the following-mentioned persons and parties, to wit:

Oliver S. Judd, of New Britain, Connecticut, at said New Britain; Edwin A. Palmer and Adolphus J. Simmons, of Clayville, in the county of Oneida and State of New York, at said Oneida.

These defendants, on information and belief, further answering, say that said letters patent are illegal, null, and void, because that the said alleged invention of Charles B. Bristol and all the material and substantial parts thereof were, long prior to any supposed invention thereof by said Bristol, patented and described in the following-mentioned letters patent and printed publications, to wit:

20 Letters patent of these United States to W. B. Carpenter (No. 8965), granted and dated May 25, 1852 (watch chain attachment).

Letters patent of these United States to S. F. D. Arrowsmith (No. 8715), granted and dated February 10, 1852 (watch chain attachment).

Letters patent of these United States to Edwin A. Palmer and Adolphus J. Simmons (No. 9252), granted and dated September 7, 1852 (whiffletree hook).

Letters patent of these United States to A. Cooley (No. 17668), granted and dated June 30, 1857 (whiffletree hook).

Letters patent of these United States to J. R. Henshaw (No. 21879), granted and dated October 26, 1858 (snap hook).

Letters patent of these United States to D. H. Hull (No. 24462), granted and dated June 21, 1859 (whiffletree hook).

Letters patent of these United States to J. North (No. 30687), granted and dated November 20, 1860 (snap hook).

Letters patent of these United States to J. North (No. 30084), granted and dated September 18, 1860 (snap hook).

Letters patent of these United States to Oliver S. Judd (No. 39659), granted and dated August 25, 1863 (snap hook).

Letters patent of these United States to S. Babcock (No. 40806), granted and dated December 8, 1863 (snap hook).

Letters patent of these United States to Oliver S. Judd (No. 45414), granted and dated December 13, 1864 (snap hook).

21 These defendants, on information and belief, further answering, say that the letters patent on which this suit is brought are null and void, because that they were surreptitiously or unjustly obtained for that which was in fact invented by Oliver S. Judd, of New Britain, Connecticut, at said New Britain, who was using and did use reasonable diligence in adapting and perfecting the same.

These defendants, on information and belief, further answering, say that in view of the state of the art to which said Bristol's said alleged invention relates, as it existed at the time that said Bristol made his said alleged invention, there was no invention exercised by said Bristol in making, constructing, or using such hooks made, constructed, or used upon the plan set forth in said letters patent on which this suit is brought, and that such changes in construction as said Bristol did make were the product of common judgment and mere mechanical skill, and that the things claimed in said letters patent on which this suit is brought do not amount to an invention.

And these defendants deny that any matter or thing contained in said bill of complaint, and not herein and hereby well and sufficiently answered, traversed, or denied is true to the knowledge or belief of these defendants, all of which these defendants stand ready to aver, maintain, and prove; and they pray to be hence dismissed, with their costs in this behalf wrongfully sustained.

ANDREW N. BRAGG.
ROBERT R. SMITH.

WM. EDGAR SIMONDS,
*Solicitor and of Counsel.*

22 UNITED STATES OF AMERICA,
DISTRICT OF CONNECTICUT, } *ss:*
*State of Connecticut, County of Litchfield,*

Said Andrew N. Bragg and Robert R. Smith, being duly cautioned and sworn, say: That they are the said defendants; that they have read the foregoing answer and know the contents thereof; that the same is true of their own knowledge, except as to those things therein stated of information and belief, and as to those things they believe it to be true.

Before me, at New Hartford, in the county of Litchfield and State of Connecticut, on the 28th day of May, A. D. 1880.

[NOTARIAL SEAL.] H. W. BROWN,
*Notary Public.*

23 And on the 23rd day of July, 1880, the complainants filed in court their replication to said answer in the words and figures following, viz:

*The Replication of the Above-Named Complainants, W. & E. T. Fitch, to the Answer of A. N. Bragg & Co.*

Circuit Court United States, District of Connecticut. In Equity.

W. & E. T. FITCH *vs.* A. N. BRAGG & CO.

The repliants, saving and reserving to themselves all and all man-

ner of advantage and exception to the manifold insufficiencies of said answer, for replication thereto saith that they will aver and prove their said bill to be true and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed, or denied, is true; all which matters and things this repliant will be ready to aver and prove as this honorable court shall direct, and humbly prays as by said bill already prayed.

JNO. S. BEACH,
*Solicitor for Complainant.*

24 And on the 5th day of January, 1881, stipulation amending defendants' answer was filed in the words and figures following, viz:

25 United States Circuit Court, District of Connecticut. In Equity.

W. & E. T. FITCH *vs.* A. N. BRAGG & CO.

It is hereby stipulated that defendants' answer in this cause be, and hereby is, amended by inserting therein the following:

"These defendants, further answering, on information, advice, and belief, aver that the first clause of claim of said patent numbered 47464 is null and void, because that no one can learn therefrom—even in connection with the appurtenant specification and drawings—what it is that is intended to be claimed therein, particularly that no one can learn therefrom what kind of a recess for the spring the snap hook tongue must have, or what kind of a spring the snap hook must have, or what relations the spring must maintain with the other parts of the snap hook to come within the meaning and cover of said claim."

"These defendants, further answering, on information, advice, and belief, aver that the first clause of claim of said patent numbered 47464 is null and void, because that the union of parts therein claimed as a combination is not a patentable combination, but is mere aggregation of parts."

JOHN S. BEACH,
*Complainants' Solicitor.*
W. E. SIMONDS,
*Defendants' Solicitor.*

26 And on the 18th day of June, 1881, complainants' and defendants' evidence was filed in the words and figures following, viz:

27 *Testimony Taken Under and Pursuant to the 67th Rule of the Supreme Court of the United States, in Equity, as Amended, before John B. Mills, Notary Public, Pursuant to Notice and by Consent of Parties.*

United States Circuit Court, District of Connecticut. In Equity.

W. & E. T. FITCH *vs.* A. N. BRAGG & Co.

Present: John S. Beach, Esq., of counsel for complainants; W. E. Simonds, Esq., of counsel for defendants.

NEW HAVEN, *Oct.* 12, 1880—10 o'clock a. m.

Complainants' counsel puts in evidence letters patent issued to Charles B. Bristol, of New Haven, Conn., assignor to himself, William W. Hughes, William H. Andrews, and L. J. Bristol, of the same place, for improved snap hook, bearing date the 16th day of May, 1865, and the same is marked Complainants' Exhibit "Letters Patent," J. B. M., N. P.

He also puts in evidence an assignment, bearing date the 30th day of November, 1865, from Charles B. Bristol, William W.
28 Hughes, William H. Andrews and Lambert J. Bristol to the complainants of all their right, title, and interest in said letters patent, and in any reissues, renewals, or extensions thereof, recorded in the office of the Commissioner of Patents, Dec. 15, 1865, in liber E S, page 118, of transfers of patents, and the same is marked Complainants' Exhibit "Assignment," J. B. M., N. P.

It is agreed that certified copies of the said patent and assignment may be substituted for the original.

Complainants' counsel also puts in evidence a snap hoop marked Complainants' Exhibit "Complainants' Snap Hook," J. B. M., N. P.

Complainants' counsel also puts in evidence snap hook marked Complainants' Exhibit "Defendants' Sample," J. B. M., N. P.

(It is agreed that this last exhibit correctly represents a class of snap hooks made and sold by the defendants after the issuing of said letters patent and before the bringing of this suit.)

29 JOHN E. EARLE, a witness produced by and on behalf of the complainant, having been duly cautioned and sworn, to interrogatories proposed by JOHN S. BEACH, Esq., of counsel for the complainant, answered as follows:

Interrogatory 1. What is your name, age, residence, and occupation?

Answer. John E. Earle; age, 49; residence, New Haven, Conn.; occupation, solicitor of patents, and have been frequently examined as expert in patent causes.

Int. 2. Have you read and do you understand the letters patent granted to Charles B. Bristol, of New Haven, Conn., assignor to himself, Wm. W. Hughes, Wm. H. Andrews, and L. J. Bristol, for improved snap hook, bearing date the 16th day of May, 1865?

Ans. I have and I do.

Int. 3. Will you please state what the invention is which you find therein described, having reference to the state of the art in the manufacture of snap hooks at the time of the issuing of said letters patent, if you have any knowledge on that subject?

Ans. I have been familiar with snap hooks and patents therefor since 1862. During that time I have prepared more than thirty applications for letters patent for snap hooks. I have a copy of all the patents granted in this country and England on snap hooks; have been many times consulted with reference to the patentability of snap hooks and questions of infringements pertaining to the same; have been several times called as expert in suits based upon snap-hook patents, and have made this art a specialty for more than fifteen years. The invention shown and described in the patent of Bristol is an improvement in that class of snap hooks in which the tongue is pivoted in a recess between two cheeks in the shank. In this recess a coil spring is arranged around the pivot so that the two ends of the spring bear, one upon the tongue and the other upon the body of the hook, tending to press the tongue up against the end of the hook, but yet permit the tongue to be depressed to open the hook. In this class of hooks prior to Bristol the tongue was cast with a recess upon its under side to form two cheeks corresponding to the cheeks in the shank of the hook. The cheeks on the tongue were drilled corresponding to the hole through the cheeks in the shank, so that a rivet could be inserted through the sides of the shank and both sides of the tongue to form the pivot on which the tongue would turn. The coil of the spring was arranged around the pivot, the two ends bearing, one upon the shank and one upon the hook, as before described. The first part of the invention of Bristol consisted in an improvement in the construction of the tongue by making the recess for the spring in one side of the tongue instead of upon the under side, whereby one of the cheeks on the tongue was dispensed with, and the drilling of the pivot holes might be avoided, as in molding the Bristol tongue with the side recess the pivot hole in the pattern would leave a core in the sand to form the pivot hole in the tongue, and so that the coil of the spring would be introduced into the recess in the tongue at the side. The first claim of the patent is for a tongue constructed with the recess in the side combined with a coil spring which rests in said recess and operating between the body of the hook and the tongue, as I have described.

The second part of the invention related to an improvement in the construction of the body of the hook whereby the drilling of the cheeks for the pivot and the introduction of an independent pivot was avoided. This improvement consisted in casting the cheeks of the shank spread apart from what was to be their condition in the complete hook, and with a stud or fulcrum pin cast on one of the cheeks, but not extending to the other, the length of the stud being no greater than the space between the cheeks when the hook is complete. The tongue, having a transverse perforation corresponding to the stud or fulcrum pin, was placed between the cheeks of the shank or body of the hook on to the fulcrum pin,

and then the cheeks of the shank were pressed toward each other so as to retain the tongue upon the fulcrum pin. This improvement is the invention recited in the second claim.

Int. 4. Please look at the snap hooks marked Complainants' Exhibit "Complainants' Snap Hook," and say whether or not they correctly represent the improvements which you have described.

Ans. They do correctly represent the two improvements
31 described and claimed in the Bristol patent and which I have described in my last answer.

Int. 5. Please look at the snap hook now shown you, marked Complainants' Exhibit "Old Snap Hook," and say if it correctly represents the snap hook known in the art at the time of the invention of Bristol as described by you in your answer to Int. 3.

Ans. It does, and is the construction of hook which I referred to, and the detached tongue illustrates the method of casting which I described.

Int. 6. Please look at the snap hooks now shown you, marked "Defendants' Snap Hook," and say whether you find embodied therein the invention described and shown in the specification and drawing of the Bristol patent or specified in either of the claims thereof; and, if you say you do, state to what extent, and give your reasons for your conclusion.

Ans. I do find in the Exhibit "Defendants' Snap Hook" the invention shown and described in the Bristol patent, and particularly recited in the first claim, for the reason that the tongue is identical in shape and construction with the tongue shown and described in the specification in said patent; that is to say, it has the recess "*r*" formed in the side of the tongue within which the spiral spring rests and acts upon the same tortion principle, and the tongue is arranged in the body of the hook in the same identical combination that it is in the Bristol patent. I say the tongue is identically the same shape as that shown in the patent, and in saying this I take into consideration the fact that the drawing shows an extension or projection at the rear end of the tongue called in the patent trigger "*t*," but inasmuch as the specification says the tongue may be made with or without the trigger, I do not consider that a material difference, hence say the two are identical.

No cross-examination.

JOHN E. EARLE.

Subscribed and sworn to before me, the 12th day of October, A. D. 1880.

JOHN B. MILLS,
*Notary Public.*

32 Hearing resumed.

NEW HAVEN, *Dec.* 23, 1880.

Present: John S. Beach, Esq., for complainant, and W. E. Simonds, Esq., for defendant.

ELEAZER T. FITCH, a witness produced by and on behalf of the

complainant, having been duly cautioned and sworn, to interrogatories proposed by JOHN S. BEACH, Esq., of counsel for the complainant, answered as follows:

Int. 1. What is your name, age, residence, and occupation?

Ans. Eleazer T. Fitch; age, 51; residence, New Haven, Conn.; occupation, manufacturer.

Int. 2. You are a member of the firm of W. & E. T. Fitch, complainants in this case, are you not?

Ans. Yes.

Int. 3. When did that firm begin to manufacture and sell snap hooks like Exhibit "Complainants' Snap Hook," constructed under the Bristol patent?

Ans. In 1865.

Int. 4. Counting from that time up to the present, to what extent have they put such hooks on the market?

Ans. We have sold thirteen million.

Cross-examined by W. E. SIMONDS, Esq., of counsel for defendant:

Cr.-int. 5. What do you consider to be the practical advantage of making the recess for the spring in the side of the tongue, as shown in the patent sued on?

Complainants' counsel interposes and says that the witness is in feeble health and unable to endure a long examination, and for that reason counsel has directed the examination of the witness to the single inquiry which he alone was competent to answer; that counsel objects to the question as not being germane to the direct examination, and for the reason above stated advises the witness to decline to answer.

33 Ans. Under the advice of counsel I decline to answer.

ELEAZER T. FITCH.

Subscribed and sworn to before me, this 23d day of December, 1880.

JOHN B. MILLS,
*Notary Public.*

Complainants' counsel offers Mr. Earle, who has already testified in the case, for cross-examination on the points on which he has advised Mr. Fitch not to answer.

JOHN E. EARLE, the witness above referred to, accordingly having been produced for cross-examination, to interrogatories proposed by W. E. SIMONDS, Esq., of counsel for the defendants, answered as follows:

Cr.-int. 7. What is the special advantage or utility consequent upon making such parts of a snap hook, as are referred to in the first clause of the claim of the patent sued on, in the manner described in that patent?

Ans. As I have before stated, it enables the tongue to be moulded and cast easier than the previous construction of recess tongue; it

also permits the tongue to be cast with the pivot perforation formed in the process of casting, whereby the drilling of the cheeks may be avoided; it also saves one of the cheeks or sides of the recess in the previous construction, hence less metal is used in the formation of the hook; again, in assembling the parts, the spring is more conveniently arranged in its place in the recess than it can be done in the recess of the previous hook. By previous hook or tongue, I mean the Judd patent, to which I before referred.

Cr.-int. 8. Is there any practical difficulty incident to casting the tongue of Complainants' Exhibit "Old Snap Hook"?

Ans. Yes, sir; that is a greater difficulty than casting the tongue of complainants' patent, because in moulding the tongue of complainants' patent it leaves the core for the recess very much larger in extent than in the old hook, and also leaves that core in full
34 connection with the sand outside, so that there is little or no liability of the core breaking down, whereas in the old hook the core is very thin and two or three times the height of the core in moulding complainants' tongue, and without the outside support which the peculiar recess of complainants' tongue gives to the core. Again, there are two thin cheeks in the old tongue to be formed, and only one in complainants' hook; hence there is twice the liability to make an imperfect casting that there is in making complainants' tongue, owing to the lack of filling out the thin cheeks in pouring the metal.

Cr.-int. 9. Do you find in the Complainants' Exhibit "Old Snap Hook" a combination of the tongue with the spiral spring, where the spring works on the tortion principle and rests in a recess in the rear end of the tongue?

Ans. Broadly considered, yes, as I have before stated; but not the recess "*r*" of the patent.

Cr.-int. 10. What is the recess of the patent sued on?

Ans. It is a recess formed in one side of the head of the tongue, opening beneath the tongue, to permit one arm of the spring to pass through, so as to bear upon the body of the hook, while the other end bears upon the tongue.

Cr.-int. 11. Then "the recess" of the patent sued on does not include any and all recesses made for the spring in the side of the tongue, does it?

Ans. It does, if those recesses have the peculiarities I have mentioned.

Cr.-int. 12. Does the recess of the complainants' patent mean a recess having an opening for the spring to project therefrom, as described in complainants' patent?

Ans. The opening through which the spring projects in necessarily a part of the recess in the side of the tongue, but it is not the recess "*r*" unless it has that opening.

Cr.-int. 13. My question is based upon your 10th answer, wherein you say that "the recess" of complainants' patent is one having an opening beneath, which, opening beneath, performs some office or purpose in connection with the spring; and what I want to know is, whether that opening beneath is to be one which allows the spring

to project from the recess in the manner described in complainants' patent?

35 Ans. I did not say the recess was one having an opening beneath, but it is a recess in the side of the head, having an opening through which one arm of the spring must project, pointing towards the hook, as described in the patent.

Cr.-int. 14. Very well, then, my question is based upon your tenth answer, wherein you say that "the recess" of complainants' patent is one formed in one side of the head and having an opening beneath, which opening beneath performs some office or purpose in connection with the spring. What I want to know is whether that opening beneath is to be one which allows a spring to project from the recess, as is exemplified in Complainants' Exhibit "Complainants' Snap Hook"?

Ans. It must be of such a nature as to permit the end of the spring to get outside the walls of the recess and take its bearing on the body of the hook.

Cr.-int. 15. Why do you constantly refer to one end of the spring and leave the other out of consideration?

Ans. Because I can conceive that the other end might possibly come entirely within the recess and not project beyond it; and, in fact, if the spring be made as shown in Fig. 4 of the patent the end would not project through the opening in the recess, but it would be no less the recess of the patent if both ends projected through the opening in the recess. In the hook, Complainants' Exhibit "Snap Hook," both ends of the spring do project through the recess. It will be observed in Fig. 4 that one arm "*h*" of the spring is made very much longer than the arm "*i*." The arm "*h*" is shown in Fig. 4 as extending through the opening in the recess of the tongue to take its bearing on the body of the hook. The other, "*i*," or shorter arm, does not appear, and if arranged in the recess of the tongue, Fig. 3, it would lie entirely within the recess and not project through the opening.

Cr.-int. 16. Is there any substantial difference between a snap hook of complainants' patent and Complainants' Exhibit Complainants' "Snap Hook"?

Ans. There is no material difference between the complainants' "snap hook" and the hook shown and described in the patent.

36 Cr.-int. 17. When the parts of Complainants' Exhibit "Old Snap Hook" are assembled together in normal working order, and the parts of Complainants' Exhibit "Complainants' Snap Hook" are also assembled together in working order, do or do not the springs of both of them have ends taking their bearings one end upon the body of the hook and one end upon the tongue in substantially the same manner?

Ans. Substantially the same; yes, sir.

Cr.-int. 18. Then the advantages incident to the construction described in the Bristol patent consist, do they not, substantially as you look at the matter, in an advantage in the matter of casting and advantage in the matter of assembling the parts?

Ans. Yes, and producing a hook of cheaper construction. It also

enables making the hook so that it will be less liable to clog by lodgment of dirt or foreign substance in the recess in the body of the hook, between the cheeks, because, forming the recess in the side of the tongue, as in complainants' patent, the wall of the recess extends around below the pivot. This permits making the recess in the hook to receive the head or body of the tongue through the back, so that the dirt will readily work through the opening below the spring, being protected by the wall around the recess in the tongue, as readily seen in Exhibit "Complainants' Snap Hook," whereas in the Judd or Exhibit "Old Snap Hook" the recess in the tongue is necessarily open at the bottom; hence to properly protect the spring there is no opening through the back of the hook, and hence not the escape for dirt, etc., that there is in complainants' hook. Therefore the hook is not only cheaper in consequence of the peculiar recess of complainants' patent, but is better than the old snap hook upon which it was an improvement.

Cr.-int. 19. I suppose you ought to claim to be a practical moulder.

Ans. That is not my business at present, but I have practised moulding many years ago, as well as pattern-making, and have spent much time in foundries, so that I am perfectly familiar with moulding, and am practically familiar with making patterns for castings, which necessarily requires a knowledge of moulding in order to prepare the patterns for the best shape of the mould in which the casting is to be made.

Cr.-int. 20. Your practice in moulding and casting was as an amateur, was it not?

37 Ans. If by amateur you mean for the fun of the thing, no; it was in practical work in connection with patterns and machinery in the construction of which I was engaged.

Cr.-int. 21. I suppose you know the difference between the meaning of the word "amateur" and the words "practical workman"?

Ans. I have stated my experience; you can call it what you like.

Cr.-int. 22. Have you ever been employed for wages as a moulder?

Ans. Not simply as moulder, but I was paid for my time while I was doing the moulding I have referred to.

Cr.-int. 23. I suppose you don't undertake to say that complainants' patent requires the snap hook tongue to be cast, do you?

Ans. No, sir; if a person should be disposed to make it from wrought metal as in forging, they could undoubtedly do it, and in so doing the peculiar recess of the hook would have still greater advantages over the shaping of the old hook than it does in casting. I never saw a forged snap tongue, and doubt if it would be practicable to make a forged tongue in competition with a cast metal tongue.

Cr.-int. 24. When complainants' patent says, "I make the tongue G, Figs. 3 and 4, by casting or making it substantially in the form shown," don't you understand the phrase "or making it," as they are used, to refer to a mode of producing a tongue other than casting?

Ans. It may, or it may have been used as an analogous word;

but if the word "making" was not there I do not understand that his claim would be limited to casting, as that is only a description of how the tongue may be made.

Cr.-int. 25. As a matter of fact, don't you suppose the first claim of complainants' patent to have been drawn in ignorance of the state of the art, except that part of it which is exemplified by the Henshaw patent?

(Objected to as irrelevant.)

Ans. I have no reason to suppose so, for I do know that Mr. Bristol was thoroughly acquainted with the state of the art when that application was made.

38 Cr.-int. 26. The patent specification is evidently prepared by R. Fitzgerald; have you any reason to suppose that Mr. Fitzgerald was posted as to the state of the art?

(Objected to for same reason.)

Ans. I have reason to know that he was.

JOHN E. EARLE.

Subscribed and sworn to before me, this 23d day of September, 1880.

JOHN B. MILLS,
*Notary Public.*

NEW HAVEN, *April 1st*, 1881—10 o'clock a. m.

Present: John S. Beach, of counsel for complainant; W. E. Simonds, of counsel for defendant.

JOHN E. EARLE, a witness heretofore sworn and produced on the part of the complainants, recalled by the complainants for further examination:

Int. 1. Have you already been examined as a witness in this case?

Ans. I have.

Int. 2. Have you read the testimony of James Shephard, a witness produced by and on behalf of the defendants in this suit?

Ans. I have.

Int. 3. Mr. Shephard says that he fails to find any limitation either in the specification or first claim of the combination therein referred to, and construes the said first claim to include broadly "a spiral spring working on the tortion principle and resting in a recess of any form in the rear end of the tongue." Do you agree with him in his understanding of the scope of that first claim of the patent?

Ans. No, sir, I do not, for the reason that the recess, described and recited in the claim, is of a particular character, and is designated as the recess "*r*," which recess, on reference to the

39 drawing, is found to be formed in the side of the tongue instead of within the tongue, as in previous constructions, Exhibit "Old Snap Hook," for instance; and further, this recess "*r*" opens at the under side so as to permit one arm of the spring to extend out from the recess to take its bearing in the body of the

hook. The claim is not for a recess broadly and spring arranged therein, so as by its action to close the hook, as that was well known in the state of the art and shown in drawings and models in the U. S. Patent Office prior to the granting of the patent to Bristol. It is a special peculiar recess designated as "*r*," substantially as described in the specification and drawing which forms part of the specification and as I have already mentioned.

Int. 4. I infer, then, that if you agreed with Mr. Shephard in understanding the first claim of the patent to include any form of swinging tongue so mounted as to be capable of oscillation, and having a spiral spring working on the tortion principle and resting in a recess of any form, you would agree with him in his answer to Int. 4, in which he says he finds substantially the same combination in the Exhibit "Hull Patent" and Exhibit "Palmer & Simmons Patent," and the Exhibit "Judd Patent of 1864." Is this inference correct?

Ans. It is, and that state of the art is what I endeavored to state in my previous examination, and as exhibited by the Judd patent, that is, Complainants' Exhibit "Old Snap Hook."

Int. 5. Mr. Shephard is asked by Int. 6, "Suppose a more limited construction of that first claim, wherein the form of the recess in the tongue shall be made essential, to wit, a combination of a tongue having a side recess with a tortional spring in such recess. Then is or not the combination found in any of the prior patents or exhibits made under them?" and he answers: "It is in the Hull patent and the exhibit made under it; also in the Palmer & Simmons patent and exhibit made under it." Will you please state to what extent you agree with Mr. Shephard in his testimony on this point?

Ans. If the claim were to be construed as broadly for a tongue having a recess in its side, within which a tortional spring was arranged, then the Hull patent and the Palmer & Simmons patent would show such a recess and spring; but if the question and answer referred to is intended to convey the idea that the recess in the tongue of the Hull patent and Palmer & Simmons patent is what is claimed as the recess "*r*" in the Bristol patent, then Mr. Shephard is in error, for the reason that the recess in the Hull patent and Palmer & Simmons patent entirely encloses the spring; one end of the spring is attached to the tongue within the said recess, and the other end is attached to the body also within the recess; there is no opening outward from the recess through which the arm of the spring can extend to bear upon the tongue as in the Bristol patent, and which is an essential feature of that patent as I have stated. Again, it would be impracticable, not to say impossible, to make a snap hook with such a recess and connection of spring as that shown in the Hull and Palmer & Simmons patents and exhibits "hooks." The Hull patent is not in any sense a snap hook, or any other kind of a hook. It is simply a spring latch arranged to engage something which may have been introduced through a hole in the body of the device, but that latch cannot automatically engage as in a snap hook; the latch must first be turned away from over the opening and there held until the thing to be

engaged is introduced through that opening; then, if permitted, the latch will spring back. Because of the size permitted in this Hull device the spring may be engaged with each of the parts, as I have before mentioned, but I see no possible way that this device could be constructed with an opening from the recess for the end of the spring to take its bearing on the body of the device, as is permitted by the peculiar recess in the tongue of the Bristol patent.

The Palmer & Simmons patent is not a snap hook in the general sense in which that term is used, but is a device for attaching the trace to a whiffletree end. It is necessarily large and permits the entirely enclosed chamber, within which the spring is arranged, as I have before described. Its whole construction adapts it to its peculiar use, and by no possibility could the swinging or movable part be constructed with a recess, having an opening therefrom, through which the end of the spring could extend to bear on the body; as in the Bristol snap hook; again it would be impracticable to make a snap hook, such as commonly called snap hooks, and as ex-
41 hibited in this case as snap hooks, with a recess in the side, without an opening therefrom, one end of the spring turned to one side into a hole in the body of the hook, and the other to the opposite side into a hole in the tongue, as the springs are engaged in the Hull patent and Palmer & Simmons patent. It is from these essential differences of construction that I say the recess in the Hull device, and in the Palmer & Simmons device, is essentially different from the recess in the Bristol tongue.

Int. 6. In answer to interrogatory 8, Mr. Shepard points out that "the particular form shown in Fig. 3 of the drawing to which the specification makes special reference is not a practical form without a slight modification. As shown in Fig. 3, the spring seat for one of the tangential arms of the spring to rest upon extends so far from the body of the tongue that when combined with the hooks, in the manner described in the patent, the arms would prevent the tongue from swinging open." Will you please look at the drawing, Fig. 3, of the patent, and say whether you find the defect thus pointed out by the witness?

Ans. There is no such defect. Mr. Shepard has evidently misunderstood that figure. It is a perspective view, and is so described in the specification. It is made as looking from the lower side of the tongue upward, and if the tongue, Exhibit "Complainants' Snap Hook," be placed upon or near the said figure, and the same view taken of it, they will be found to be as near alike as it is possible to make them, so far as the recess is concerned, or the extent to which the upper side comes down. There is ample room for the spring to work. Further, if it were the fact that the upper side of the recess did extend further around, it could not, as stated by Mr. Shepard, prevent the tongue from swinging open, because the arm of the spring, which he refers to as bearing against the tongue, is on the opposite side to the arm which bears upon the body; hence they could not come together, no matter what was the length of the arm bearing on the tongue. Again, the arm, which is represented to bear upon the tongue, is very short, following the tongue in its opening movement,

and could not come in contact with any part of the hook itself, as the body of the hook is open below, and, even if the arm were
42 of sufficient length to project a considerable distance from the recess in the tongue, it would simply turn down through the recess in the body of the hook; it cannot come in contact with anything to interfere with its opening. The opening from the recess in the tongue is so far above the arm which bears upon the body of the hook that the tongue itself could not come in contact with that arm. Fig. 3 is identical with the tongue, Complainants' Exhibit "Complainants' Snap Hook." I think if Fig. 3 had been simply a geometrical side view, instead of a perspective view, Mr. Shepard would not have fallen into the error he did. He evidently overlooked the fact that the tongue is round, which gives an appearance in perspective as if the upper side of the recess extended further around than it in fact does.

Int. 7. In answer to the same interrogatory No. 8, the defendants' expert says: "So far as the first claim is concerned, the only peculiarity which can be found for the tongue is that the opening on the front side of the recess forms a spring seat for one arm of the spring, at a point between the fulcrum and swinging end of the tongue." What do you say to this?

Ans. I say that if he means that that recess shall be constructed with an opening through which one arm of the spring, lying in said recess, may extend outward so as to take a bearing on the body of the hook somewhere between the fulcrum and the swinging end of the tongue, or so that it shall tend to close the tongue, then he has properly defined the peculiarity of the tongue; but if he means that the recess is to be constructed so as to form a seat in itself at a point in fact forward of the fulcrum, then that is not the peculiarity, for I do not consider it essential that the arm of the spring which closes the tongue shall bear at any particular point within the recess, only that it shall bear upon the tongue directly, and act against the arm of the spring which extends through the opening in the recess, and takes its seat upon the body of the hook.

Int. 8. In answer to interrogatory 24, the defendants' expert says: "The tongue of the Complainants' Exhibit 'Defendants' Snap' does not have a spring seat upon the under side of the tongue and between the fulcrum and free end of the tongue, and in this respect is unlike the tongue of the Bristol patent." Do you find this difference; and, if so, how far is it a material difference?

43 Ans. No, sir; I do not. On comparison of the tongue, Complainants' Exhibit "Complainants' Snap Hook," which is the tongue of the Bristol patent, with the tongue of Complainants' Exhibit "Defendants' Snap Hook," it will be found that if there is a bearing of the tongue in complainants' snap hook at any particular point, there is identically the same bearing at the same point in the tongue of defendants' snap hook. It is true that the arm of the spring of defendants' snap is not bent quite as far around as in the hook of complainants' snap, but in both one arm of the spring extends through the opening in the recess to take its seat on the body of the hook. The other arm takes its seat at a point where, acting

against the arm which rests on the body, it will force the tongue into its closed position, one substantially the same as the other. That the bearing point of both is the same may be seen by a comparison of the two springs of hooks of same size, which readily shows that the spring of the one may be used in the hook of the other without any change whatever in the tongue or the body of the hook; that is to say, in hooks of the same size the tongues, springs and bodies are interchangeable in the complainants' and defendants' hooks.

Int. 9. In answer to Int. 29, defendants' expert is asked, "Has the shape of recess and the manner of combining a spring with the other parts, shown in defendants' snap hook, any advantage or advantages peculiar thereto?" and the witness answers: "Yes; it enables the tongue to be formed with a slight projection of its inside, so as to cover the opening into the recess to a greater extent than can be done when both arms project through said opening. By constructing the spring seat at the rear of the pivot in a slight enlargement of the recess which surrounds the pivot a spring can be used in which one of the arms projects but a very short distance, and the spring seat can be brought close to the coils of the spring, and thereby the coil portion of the spring is the first portion to be deflected." Will you please compare the defendants' snap hook with that described in the patent, and say whether you find these advantages in favor of the defendants' hook over the patented hook?

Ans. There are no such advantages. On the contrary, there is no greater projection of the side of the recess referred to in the one than in the other. It is impossible that springs can be used in the one, with a shorter arm to bear upon the tongue, than can be used in the other. There is no object or advantage whatever in having the arm which bears on the tongue extend outside the recess, because it cannot, by any possibility, obtain a bearing on the tongue outside of the limits of that recess; therefore just so much as the tongue's spring arm extends outside the recess there is just so much superfluous and useless metal; its bearing is and must be, in fact, within the recess; and it is immaterial whether it be above and forward of the pivot, or below in rear of it, the result is the same, and there is no essential difference in the construction or arrangement, or no particular advantage, the one over the other. I should remark that in the tongue of Complainants' Exhibit "Defendants' Snap" the heel or pivot end of the tongue extends further to the rear than in the Bristol patent or in complainants' snap, which may appear to give an apparent forward projection of the edges at the opening of the recess. All the extension there is in the defendants' tongue is that to the rear of the pivot, which elongates the recess without any apparent use or object.

Int. 10. In your testimony given on the opening of the complainants' case you, in answer to cross-interrogatories addressed to you, described certain advantages the complainants' hook has over the old hooks of the same class. Having read the testimony of Mr. Shepard on this point, do you now desire to change or add to your testimony in that regard in any particular?

Ans. Mr. Shepard says of the defendants' snap that the hole

through the tongue is a drilled hole; hence the advantage of casting that hole is not utilized. It is true the hole in defendants' snap is drilled; but owing to the peculiar shape of the tongue—that is, making it like the tongue of complainants' hook—he could cast it as the complainants do. I do not understand the fact that he does not utilize that advantage makes his tongue a different tongue. The pivot hole is there. Mr. Shepard seems to think there is no saving of metal in the tongue as made in accordance with complainants' patent and that of Exhibit "Old Snap Hook." A comparison of the two will readily show Mr. Shepard's error. When the tongue
45 is cast, as in Exhibit "Old Snap Hook," it will be observed that the back of the tongue is more than twice as thick as the tongue of "Complainants' Snap Hook," and the cheeks are both more than twice as thick at their junction with the back than is the single cheek of complainants' tongue. There is, then, a saving of metal which I mentioned. Mr. Shepard's testimony only tends to confirm me in my statement of advantages referred to in the question.

No cross-examination.

JOHN E. EARLE.

Subscribed and sworn to before me, this 1st day of April, 1881.

JOHN B. MILLS,
*Notary Public.*

46 *Testimony Taken Under and Pursuant to the 67th Rule of the Supreme Court of the United States, in Equity, as Amended, before Lewis Sperry, Notary Public, Pursuant to Notice and by Consent of Parties.*

United States Circuit Court, District of Connecticut.

W. & E. T. FITCH *vs.* A. N. BRAGG & Co.

Present: John S. Beach, Esq., in behalf of complainants, and W. E. Simonds, Esq., in behalf of respondents.

HARTFORD, CONN., 10 A. M., *February 5th*, 1881.

Defendants' counsel offers in evidence certified copies of the following patents of the United States:

To Edwin A. Palmer and Adolphus Simmons, dated September 7th, 1852, numbered 9252, and the same is marked Defendants' Exhibit Palmer and Simmons Patent.

To John R. Henshaw, dated October 26th, 1858, numbered 21879, and same is marked Defendants' Exhibit Henshaw Patent.

To Daniel H. Hull, dated June 21st, 1859, numbered 24462, and same is marked Defendants' Exhibit Hull Patent.

To Oliver S. Judd, dated August 25, 1863, numbered 39659. Same is marked Defendants' Exhibit Judd's 1863 Patent.

To Oliver S. Judd, dated December 13, 1864, numbered 45414, and same is marked Defendants' Exhibit Judd's 1864 Patent.

47 To John North, dated September 18, 1860, numbered 30084, and same is marked Defendants' Exhibit North Patent.

To C. S. Abeel, dated January 5th, 1864, numbered 41131, and same is marked Defendants' Exhibit Abeel Patent.

(Abeel patent objected to by complainants' counsel as not being set forth in the answer.)

(Defendants' counsel answers that Abeel patent is only offered as evidence upon the state of the art.)

Defendants' counsel also offers in evidence an article made under the Palmer and Simmons patent, and same is marked Defendants' Exhibit Palmer and Simmons Hook.

Defendants' counsel also offers in evidence an article made under the Hull patent, and same is marked Defendants' Exhibit Hull Fastener.

JAMES SHEPARD, a witness produced by and on behalf of the defendants, having been duly cautioned and sworn, to interrogatories proposed by WM. E. SIMONDS, Esq., of counsel for defendants, answered as follows:

Int. 1. State your name, age, residence, and occupation.

A. My name is James Shepard; age, forty-two; residence, New Britain, Connecticut; and occupation, solicitor of patents, and I am frequently called upon to testify as an expert in patent cases.

Int. 2. Have you examined and do you understand the patent on which this suit is brought, and also have you examined the article which is complained of as an infringement thereof?

A. Yes to all branches of the question.

Int. 3. What is the improvement or thing described in the Bristol patent and recited in the first claim thereof?

A. The thing described in the Bristol patent is a snap hook and a particular method of assembling the parts in said hook. The first claim makes special reference to the tongue and spring of this hook, the combination, as I understand it, being that of a swinging tongue with a spiral spring, when the spring works on the torsion principle and rests in a recess in the rear end of the tongue. Of course, the tongue must be mounted in some manner so as to swing; but
48 the particular manner of mounting it I understand to be made the subject-matter of the second claim, and consequently is not material to the first claim. The body of the specification has only a brief description of the tongue, and specifically mentions only the fact that it has a hole to suit the fulcrum and a recess in which the spring rests and works. The claim does not refer to this particular recess only by way of example. It cites a recess (as "*r*"), from which I understand that the recess "*r*" is one of the many that may be employed in order to come within the requirements of the claim.

The spiral spring is also only briefly described as one made in the usual way with its two ends projecting tangentially, and when combined with the tongue as having these two tangential parts pointing towards the swinging end of the tongue. The operation, so far as concern- the parts referred to in claim one, is in the following languagn, namely:

"To use this hook or snap I bear down the tongue *g* in the usual

way to open the hook, which will cause the involute torsion of the spring, and by releasing it the evolute operation of the spring will throw back the tongue to the position shown at *g*, Fig. 1."

Then follows a brief reference to the use of the tongue with an extra arm or trigger, which is immaterial to the questions under consideration in this case.

I fail to find any limitation either in the specification or in the first claim to the combination referred to therein, except that the spring shall work on the torsion principle and rest in a recess in the rear of the tongue. Any form of swinging tongue so mounted as to be capable of oscillation, and having a spiral spring working on the torsion principle and resting in a recess of any form, in the rear end of the tongue, would, in my opinion, be the thing or invention described in the patent, and specially referred to in the first claim.

Int. 4. On such an understanding of the description and the first claim of the Bristol patent, is or not the combination specified in that claim found in any of the previous patents put in evidence by the defendants, or in any of the snap or fastening exhibits put in evidence by the defendants?

A. It is, in the Exhibit Hull Patent, Exhibit Palmer and Simmons Patent, and Exhibit Judd Patent of 1864. I find the same combination of a swinging tongue and spiral spring when the spring works on the torsion principle and rests in a recess at the rear
49 end of the tongue also in the device called the Exhibit Hull Fastener, and in the exhibit called the Palmer and Simmons Hook. In all of these exhibits, excepting the Judd patent of '64, the projecting arms of the spiral spring do not project tangentially, but I do not understand that the tangential projection of the arms to be material to the first claim of the Bristol patent. Sain tangential arms are, however, clearly shown in the Judd patent of '64. The Judd patent of 1863 shows a swinging tongue with a U-shaped spring, one arm of which rests in a recess in the rear end of the tongue, and as a combination of spring and recessed tongue, it is substantially the same as that referred to in the first claim of the Bristol patent.

Int. 5. Is it or not found in Complainants' Exhibit Old Snap Hook, supposing that snap to have such a spring as that shown in Judd's patent of 1864?

A. 5. Yes; the Complainants' Exhibit Old Snap Hook has a swinging tongue with a recess in its rear end, adapted for receiving a spiral spring, and under the supposition referred to in the question contains the combination referred to in the first claim of the Bristol patent.

Int. 6. Suppose a more limited construction of that first claim wherein the form of the recess in the tongue shall be made essential, to wit, a combination of the tongue having a side recess with a torsional spring in such recess. Then is or not the combination found in any of the prior patents or exhibits made under them?

A. 6. It is in the Hull patent and the exhibit made under it, also in the Palmer and Simmons patent and exhibit made under it.

Int. 7. Then what is there of substance that is new in the combined tongue and spring of the Bristol patent as compared with the prior structures, so far as concerns the recital of the first claim?

(Question objected to by complainants' counsel.)

A. Nothing that I can discover.

Int. 8. What, if anything, is there new in such a comparison that is not of substance?

A. Nothing, so far as the recital of the first claim is concerned, unless the words "substantially as described" shall be construed to refer to the exact details and construction of the tongue, as there shown. The recess in the tongue is not described in the patent other than by reference to the drawing, other than that the spring rests and works within it, with its two tangential portions pointing towards the hook at the free end of the tongue. The particular form shown in figure 3 of the drawing to which the specification makes special reference is not a practically operative form without a slight modification. As shown in Fig. 3, the spring seat for one of the tangential arms of the spring to rest upon extends so far from the body of the tongue that when combined with the hook in the manner described in the patent the arms would prevent the tongue from swinging open. This recess is shown not only as open upon one side, but also as open upon the front. The object of making this of this form is not specifically stated in the patent, but from the description of the manner of assembling the parts its use is apparent, and that is, first, the opening on the front side is for both arms of the spring to project through, and, second, when assembling the parts to admit the fulcrum pin *a* into the recess without having to spread the body of the hook too widely open. These peculiar features, however, have particular reference to the combination or subject-matter referred to in the second claim. So far as the first claim is concerned, the only peculiarity which can be found for the tongue is that the opening on the front side of the recess forms a spring seat for one arm of the spring at a point between the fulcrum and swinging end of the tongue. There is no novelty in the spring referred to in the first claim, as identically the same style of spring, including its tangential arms, is fully and clearly shown in the patent to Judd in 1864, and combined with the tongue so as to operate exactly in the same way.

Int. 9. Complainants' expert thinks that the Bristol tongue, with the recess in the side, can be cast easier than the tongue of the Complainants' Exhibit Old Snap Hook. Supposing him to be right about this, is or not the same true of the tongue in the device of the Hull patent?

A. The tongue in the device of the Hull patent can be cast as easily and cheaply per pound as can the tongue of the Bristol patent.

Int. 10. Supposing it to be true that the Bristol tongue can be cast easier than any of the prior tongues, does such a fact have anything to do with practically combining the tongue and the spring?

A. It does not. The combination of the spring and tongue would

be precisely the same, whether the tongue is cast or otherwise formed, and the specification makes special reference to forming it in other ways than casting.

Int. 11. Does or not the difficulty or ease with which the
51 Bristol tongue may be made, by casting or otherwise, have any effect on the combination of the tongue and spring?

A. It does not.

Int. 12. Complainants' expert thinks that the Bristol tongue has an advantage in that it permits the hole for the pivot spring to be cast, and thus save the drilling thereof; is or not the same advantage present in any of the prior structures?

A. It is; the Hull patent and exhibit made under it, and in the Palmer and Simmons patent and exhibit made under it.

Int. 13. Does the presence or absence of such an advantage, if advantage it be, have any practical effect on the combination of the tongue and spring?

A. None whatever.

Int. 14. Is any such advantage present, if advantage it be, in the snap hook complained of (Complainants' Exhibit Defendants' Snap Hook)?

A. The hole through the tongue in the snap hook Complainants' Exhibit Defendants' Snap is a drilled hole, and consequently whatever advantage there may be in casting pivot holes is not present or utilized in said exhibit.

Int. 15. Complainants' expert thinks that there is a saving of metal in the Bristol tongue, as compared with the tongue of Complainants' Exhibit Old Snap Hook; will you compare the tongue of Complainants' Exhibit Complainants' Snap with the tongue of Complainants' Exhibit Old Snap Hook, and state how this is?

A. I fail to see any advantage on that point, because in the tongue of Complainants' Exhibit Snap the flange which surrounds the recess fully overbalances all advantage there is gained in saving of metal by the employment of two lips through which to pivot the tongue, as shown in the construction of Complainants' Exhibit Old Snap Hook. In tongues of the same size in these two constructions the amount of metal would be substantially the same.

Int. 16. If any such advantage be present in the Bristol tongue, does it or not have any effect on the combination of the tongue and spring?

A. It does not.

Int. 17. Complainants' expert thinks that the Bristol tongue and spring have an advantage in that they are more easily assembled with the other parts of the snap hook than is the case in prior structures. What have you to say about that?

52 A. I think he is correct, provided he refers to the assembling of them with the hook described in the patent and in the manner therein specified; but they cannot be assembled with the bodies of snap hooks, which were then known in the prior art, to any better advantage than can tongues, which were also known in the prior art. These features of the Bristol patent, which relate to assembling the parts, have nothing whatever to do with the com-

bination referred to in the first claim of the Bristol patent, but belong exclusively to the second claim.

Int. 18. Can the parts which are mentioned in the first claim of the Bristol patent be of themselves more easily assembled than corresponding parts of the prior structures?

A. They cannot.

Int. 19. Complainants' expert thinks that the Bristol snap has an advantage in that an opening in the body allows dirt to drop out of the joint. Is or not that feature of advantage, if such it be, present in any of the prior patents or structures?

A. It is. Such an advantage is shown in Exhibit Abeel Patent.

Int. 20. Does the presence or absence of such an opening in the body of the hook alter or modify the combination of tongue and spring?

A. It does not.

Int. 21. I understand complainants' expert to construe the first claim of the Bristol patent to be a combination of the tongue having a recess of a certain peculiar shape (*i. e.*, a recess located in the side of the tongue and open underneath), with a torsional spring. Does the shape of the recess make any difference with the action of the spring, or does the action of the spring make any difference with the shape of the recess? And, in connection with this question, I call your attention to a comparison of the Bristol snap with the Judd snap of 1864.

A. No, to both branches of the question. The recess in the tongue of the Bristol patent and that of the Judd patent of '64 are of different form; but when the tongues are combined with the spring the action of both spring and tongue is precisely the same in both cases, and the ends of the spring bear upon the tongue in substantially the same point in both cases.

Int. 23. If the Bristol tongue has an advantage over Complainants' Exhibit Old Snap Hook in the matter of saving metal,
53 is such advantage present in the tongue of Complainants' Exhibit Defendants' Snap Hook?

A. It is not. On the contrary, the peculiar construction of the spring, with one of its arms extending rearward, necessitates quite an extension of the tongue to the rear of the pivot, so that a considerably larger amount of metal is necessary in the construction of the tongue in Exhibit Defendants' Snap than in the construction of tongue shown in the Bristol patent.

Int. 24. You say that by taking into consideration the details of the shape of the recess in the Bristol tongue, as shown in the drawings of the Bristol patent (but reformed as suggested by you to make the device operative), it is new, as compared with prior structures, to have an opening in the bottom or front of the side recess, which allows the two ends of the spring to project tangentially forward, and that the manner of combining the tongue and the spring of the Bristol patent is such that the ends of the spring both project tangentially forward. Is there or not present in Complainants' Exhibit Defendants' Snap Hook either such an opening in the side recess of

the tongue or such a manner of combining the spring and the tongue?

A. The recess in the tongue of Complainants' Exhibit Defendants' Snap has an opening on its front side, which might, perhaps, be used to allow both arms of the spring to project forward; but it is not so used, and it is not combined with a spring in the manner described in the Bristol patent. The tongue of the Complainants' Exhibit Defendants' Snap does not have a spring seat upon the under side of the tongue and between the fulcrum and free end of the tongue, and in this respect is unlike the tongue of the Bristol patent.

Int. 25. If the terms of the first clause of the claim of the Bristol patent be limited by construction so as to cover the combination of tongue and spring only when such combination has what is new, as compared with the prior art, then, in your opinion, does or not Complainants' Exhibit Defendants' Snap Hook embody the improvement or thing described in the Bristol patent and recited in the first claim?

A. It does not, because the features which it has in common with the Bristol snap are found in the prior art.

Int. 26. Can the tongue and spring alone of the Bristol snap perform any office?

A. No, unless combined with other parts.

Int. 27. What experience, if any, have you had in snap
54 hooks, and what acquaintance, if any, have you had with the snap-hook art?

A. I have been familiar with the manufacture and use of snap hooks of different kinds for more than twenty-five years. During the last twelve years I have frequently made examinations into the art relating to snap hooks and prepared many applications for patents for snap hooks, and have frequently been consulted with reference to patents upon the same.

Int. 28. Did you ever, prior to the beginning of the present suit, see or hear of such a recess for the spring, or such a manner of combining the spring with the tongue, as is embodied in the snap hook complained of?

(Objected to by complainants' counsel as calling for evidence of which no notice was given in the answer, and as being irrelevant.)

A. I never did; that is, when considered in relation to the details of construction; but of course the general combination of recess tongue with a torsional spring is old, as shown by the several exhibits in this case, but in none of these exhibits or elsewhere have I ever seen or heard of the peculiar form of recess found in Complainants' Exhibit, Defendants' Snap, neither a snap having such a recess in its tongue and this peculiar form of spring resting therein.

Int. 29. Has the shape of recess and the manner of combining a spring with the other parts shown in the Complainants' Exhibit Defendants' Snap Hook any advantage or advantages peculiar thereto?

A. Yes: it enables the tongue to be formed with a slight projection of its inside, so as to cover the opening into the recess to a greater extent than can be done when both arms project through

said opening. By constructing the spring seat at the rear of the pivot in a slight enlargement of the recess which surrounds the pivot a spring can be used in which one of the arms projects but a very short distance, and the spring seat can be brought close to the coils of the spring and thereby the coil portion of the spring is the first portion to be deflected; and as the coil portion is more sprightly in its action than the tangential arms I believe that such a construction will make a little quicker and better acting spring than will a spring that has two tangential arms, resting upon spring seats farther from the coils of the spring.

55 Int. 30. Concisely, what is the real improvement described in the Bristol patent?

A. The manner of assembling the parts, and the peculiar construction with that end in view. When the parts are assembled the snap is substantially the same in its operation and use as prior snaps.

Int. 31. Is that invention, or any part of it, present in Defendants' Snap Hook?

A. It is not.

JAMES SHEPARD.

56 And on the 6th day of August, 1881, the court filed its opinion in the words and figures following, viz:

57 Circuit Court of the United States for the District of Connecticut.

W. & E. T. Fitch *v.* A. N. Bragg & Co.

Shipman, J.:

This is a bill in equity founded upon the alleged infringement by the defendants of letters patent granted May 16th, 1865, to Charles B. Bristol and others, assignees of said Bristol, for an improved snap hook. The patent is owned by the plaintiffs.

Bristol's invention (quoting from the testimony of Mr. Earle, the plaintiffs' expert) "is an improvement in that class of snap hooks in which the tongue is pivoted in a recess between two cheeks in the shank. In this recess a coil spring is arranged around the pivot so that the two ends of the spring bear, one upon the tongue and the other upon the body of the hook, tending to press the tongue up against the end of the hook, but yet permit the tongue to be depressed to open the hook. In this class of hooks prior to

58 Bristol, the tongue was cast with a recess upon its under side to form two cheeks corresponding to the cheeks in the shank of the hook. The cheeks on the tongue were drilled corresponding to the hole through the cheeks in the shank, so that a rivet could be inserted through the sides of the shank and both sides of the tongue to form the pivot on which the tongue would turn. The coil of the spring was arranged around the pivot, the two ends bearing, one upon the shank and one upon the hook, as before described." The invention of Bristol was in two parts. The first part consisted in constructing the tongue with a recess upon one side opening outward, through which one arm of the spring must project to bear

upon the hook. In this recess the coil of the spring was placed. The advantages of this method of construction were those of economy of material and ease of manufacture. Besides, dirt and foreign substances could not collect in an open recess. The second part of the invention consisted in an improved construction of the body of the hook. It is described in the second claim, but, as it was not infringed, it need not be carefully considered here. It is sufficient
to say that it consisted in casting a stud or fulcrum pin upon
59 one of the cheeks, but not extending to the other, the length
of the stud being no greater than the space between the cheeks when they are pressed together so as to retain the tongue upon the pin.

The first claim and the only one infringed was for "the combination of the tongue *g*, with the spiral spring (Fig. 4), when the spring works on the torsion principle and rests in a recess (as *r*) in the rear end of the tongue, substantially as herein described." This hook has had large success. Thirteen millions have been sold since 1865.

The defendants' hook had substantially the plaintiffs' recess. It differs somewhat in shape, and both ends of the spring do not project forward toward the hook, but the recess has the heretofore-described distinctive features of the first part of the invention. It is useless to say that because the defendants' do not have the precise shape of the recess, or because both ends of the spring do not point the same way, therefore the first claim is not infringed. The claim is too broad for such a narrow construction.

The more plausible line of argument is that the claim was, through ignorance of the prior art or through inadvertence, made so broad that it has no novelty, and is, therefore, invalid. The defendants, therefore, desire to construe the claim to mean "any form of
60 swinging hook so mounted as to be capable of oscillating,
and having a spiral spring working on the torsion principle and resting in a recess of any form in the rear end of the tongue." Upon this construction the Judd patent of 1864 and other patents would be anticipatory.

The claim was rather loosely drawn and did not describe the recess as definitely as it perhaps ought to have done. But the plaintiffs have refrained from seeking a reissue and have preferred to trust their patent to the well-known liberal rules of construction which have been adopted by the courts of this country, and which seek to give the owner of the patent his actual invention, if such favorable construction can fairly be made. The state of the art shows that the placing a spring to actuate the tongue in the recess *r* at the side of the tongue was the distinctive feature of Bristol's invention, and was an improvement upon the Judd hook in which "the spring was inserted in the bottom of a channel formed between the two cheeks of the shank and enclosed between the two cheeks of the tongue." The rule of construction is clearly stated by Judge Shepley, in Esterbrook *v.* Dunbar, 10 Off. Gaz., 909. After saying that technical
claims are to be construed with reference to the state of the
61 art so as to limit the patentee to and give him the full bene-
fit of the invention he has made, the learned judge says:

letters patent were issued in due form of law, on the 15th day of May, 1865, for an improvement in snap hooks, said letters patent being known and distinguished as No. 47764, and that you, the said A. N. Bragg and Company, have infringed the rights secured by the aforesaid letters patent by manufacturing, making, and selling to others snap hooks manufactured and made substantially as described and claimed in said letters patent:

67 Now, therefore, we do strictly command and perpetually enjoin you, the said A. N. Bragg and Company, and your clerks, attorneys, agents, servants, and workmen, under the pains and penalties which may fall upon you and each of you in case of disobedience, that you do absolutely desist from making, manufacturing, and selling in violation of said patent, any snap hooks having a tongue with a recess upon one side opening outward, through which one end of a coiled spring resting in said recess projects to bear upon the hook, substantially as described and claimed in the first claim of said patent.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Hartford, the 20th day of September, 1881.

E. E. MARVIN, *Clerk.*

68 UNITED STATES OF AMERICA, }
*District of Connecticut, Litchfield County,* } *ss:*

NEW HARTFORD, *Sept.* 21*st*, 1881.

Then and there I served the within writ of injunction on A. N. Bragg & Company, herein named, by delivering to and leaving with A. N. Bragg a true and attested copy hereof, and by leaving a like copy at the usual place of abode of Robert R. Smith in the hands of Nettie Carter.

Attest:

JOS. D. BATES,
*U. S. Marshal.*

Fees:

| | |
|---|---|
| Services | 4 00 |
| Copies & end | 1 50 |
| Travel | 3 84 |
| Team | 1 00 |
| | 10 34 |

69 And on the 16th day of November, 1882, the master's report and evidence before master was filed in the words and figures following, viz:

*Master's Report.*

Circuit Court United States, District of Connecticut.

W. & E. T. FITCH *vs.* A. N. BRAGG & Co.

To the honorable the judges of the circuit court:

The above-entitled cause having been referred to me as master, with instructions to ascertain, take, state, and report to the court an account of the gains, profits, and advantages which the said defendants have received, or which have arisen or accrued to them from infringing the exclusive rights of the complainants under the first claim of letters patent of the United States issued to Charles B. Bristol, bearing date May 15, 1865, as well as the damages the complainants have sustained thereby, I beg leave to report:

I met the parties with their witnesses, exhibits, and counsel on different days between the 19th day of October, 1881, and the 16th day of June, 1882, and having fully considered the matter make the following finding:

70 The defendants commenced the manufacture of snap hooks that infringed the plaintiffs' exclusive rights about the first of October, 1879, and ceased to do so on or about the 20th of September, 1881. During that time they manufactured and sold, according to their Exhibit "List of Sales," 3,667¼ gross of snap hooks with swinging tongues. I have been embarrassed in ascertaining how many snap hooks with a side recess in a swinging tongue were made during this period, owing to the fact that the different styles or patterns of hooks made and sold by the defendants were not distinguished upon their books. It is difficult to see why this was not done, especially as the defendants had early notice that the plaintiffs considered them infringers. The defendant Bragg put the number of snap hooks having a side recess in a swinging tongue at 3,000 gross, but stated positively that there was no way to distinguish the different styles of snaps made by them. He did not seem to be at all times actuated by an earnest desire to forward the purpose of the inquiry, and, after carefully considering all the testimony bearing upon this branch of the case, I find that the defendants made and sold during the period above named 3,667¼ gross of snap hooks having a side recess in a swinging tongue, in violation of the
71 plaintiffs' exclusive rights under the first claim of the Bristol patent.

*Defendants' Profits.*

There was no testimony from which I can find that there were any gains or profits to the defendants from the manufacture and sale of snap hooks by them, as aforesaid, and I therefore report that none accrued to them.

*Plaintiffs' Damages.*

The plaintiffs have suffered damage by the unlawful acts of the defendants, and in two ways:

First. Through the enforced reduction in the selling price of their goods, owing to the defendants' competition.

Second. Through the loss of profits that the plaintiffs would have made by the sale of their snaps, if the infringing snaps of the defendants had not been put upon the market.

The main difficulty in the case has been in ascertaining the extent of this loss or damage in accordance with recognized rules of law.

First, as to damage from the enforced reduction in prices. The net prices of the complainants' hooks for the year preceding December 1st, 1880, was their list price less a discount of 50 and
72 10 per cent. On December 1, 1880, they increased the discount to 60 per cent. in order to recover the market that they were losing on account of the defendants' competition.

From the list of prices both before and after December 1st, 1880, further deductions were made on account of freight and for cash, the items of which as regards the several sizes of hooks appear upon the Complainants' Exhibit "Net Prices."

The following table shows the net price of the several sizes of the plaintiffs' hooks before the reduction, December, 1880, and after that time, as appears from the evidence:

| Sizes. | Before Dec. 1, 1880. | After Dec. 1, 1880. | Am't of reduction per gross. |
|---|---|---|---|
| 1 inch & under. | 84 36 | 83 87 | 49 cents. |
| 1¼ " " | 5 65½ | 5 02 | 63½ " |
| 1½ " " | 6 05½ | 5 36½ | 69 " |
| 1¾ " " | 6 46 | 5 72½ | 73½ " |

The defendants, while not denying that the foregoing reduction in price was made by the plaintiffs at the time stated, contend that it was due in part at least to other causes than the competition of the defendants' infringing snap. They refer to the following matters as the basis of such contention:

73 First. That the plaintiffs were introducing a new style or pattern of snap at or about the time their sales fell off. I do not find that this had any effect in reducing their sales.

Second. That the plaintiffs raised the price of their snaps the latter part of 1879. A small increase was made by the plaintiffs in the price of their hooks at that time, but I do not find it had any effect in decreasing their sales.

Third. The competition in the market of different snap hooks other than those made and sold by the defendants.

The following snaps are referred to under the claim:

Anchor snap, Middletown snap, Judd & Blakeslee snap, O. B. North & Co. snaps Nos. 1 & 2, Mosher snap.

I do not find that the presence of any of these snaps in the market during the infringing period had a sensible effect in reducing the plaintiffs' sales.

On the other hand, I do find that a sufficient operative cause for such decrease in sales existed in the competition of the defendants' infringing snaps. The characteristic feature of the plain-

tiffs' snap as a finished article by which it acquired its
74 position in the market was the side recess in a swinging tongue. This feature appeared in the defendants' snaps, and they were in direct competition with those of the plaintiffs. This was early recognized by the parties, as appears from the circulars issued by them to the trade, Complainants' Exhibit "December Circular," under date of December 17, 1879; defendants reply thereto, under date of January 19, 1880, marked Complainants' Exhibit Defendants' Circular No. 1.

I find that the plaintiffs on the first of December, 1880, reduced the net price of their snaps to the extent indicated in the above table, and that such reduced price continued during the period of infringement. That such reduction in price was made on account of a decrease in the plaintiffs' sales caused by the competition of the defendants' infringing snap in the market.

The plaintiffs made and sold from December 1, 1880, to September 20, 1881, 7,697 gross of their snaps. Of these, two-thirds, viz., 5,131 gross, were of the size of one inch and under, and one-third, or 2,566 gross, were over one inch. As appears from the above table, the net reduction on snaps of the size of one inch and under was 49 cts. per gross. Of the snaps over one inch it ap-
75 pears that the bulk sold are of the size of 1½ inches. The net reduction on snaps of this size was 69 cts. It appears that there was a somewhat larger demand for snaps of the size of 1¼ inches than for those of 1⅜ inches, and I fix 68 cts. as the average reduction on all snaps over one inch in size made and sold by the plaintiffs between December 1, 1880, and September 20, 1881.

The plaintiffs' damages through the enforced reduction in the selling price of their snaps caused by the competition of the infringing snap made and sold by the defendants are as follows:

| | |
|---|---|
| 5,131 gross 1 inch and under, 49 cts. per gross | $2,514 19 |
| 2,566 gross 1 inch and over, 68 cts. per gross | 1,744 88 |
| | $4,259 07 |

Second. The second element of damage to the plaintiffs from the unlawful acts of the defendants was the loss of sales and the resulting profits that they would have made if the infringing snap of the defendants had not been in the market.

The plaintiffs had all the facilities for supplying the market with their snaps during the infringing period. The defendants' infringing snaps invaded the market that otherwise the plaintiffs would have had. The defendants' "List of Sales" shows that they had made during the period covered by it 197 sales to 90 different
76 purchasers. Of these 90 purchasers 63 were regular permanent purchasers of the plaintiffs' snaps. The defendants sold to such customers of the plaintiffs in all 3,126 gross of the infringing snaps, and of that quantity 1,984¾ gross were sold prior to De-

cember 1, 1880. The 3,126 gross so sold to the plaintiffs' customers by the defendants were the following sizes:

$\frac{5}{8}$, 44 gross.
$\frac{3}{4}$, $133\frac{3}{4}$ do.
$\frac{5}{8}$, $1,063\frac{1}{4}$ do.
1, $1,078\frac{1}{2}$ do.
$1\frac{1}{4}$, $156\frac{1}{4}$ do.
$1\frac{1}{2}$, $632\frac{1}{4}$ do.
$1\frac{3}{4}$, 18 do.

It seems to me to be a fair inference from all the circumstances of the case that the plaintiffs would have found a market for at least 3,126 gross of their snaps during the infringing period over and above the quantity actually sold by them if the infringing snaps had not been in the market. The plaintiffs' damages would be measured by the net profit that they would have made, which would be the difference between the actual cost of manufacture and sale and the sum they would have received for the goods.

There are several items that enter into the cost of a manufactured product, among which are the following:

77 Material.
Ordinary labor.
Interest on the capital invested in production.
Wages of superintendence.
Cost of marketing, including bad debts.

In defendants' Exhibit 2 some of these items are given as follows:

| | |
|---|---|
| 14 lbs. of iron, at 8 cts. | $1 12 |
| 10 oz. of brass, at $1\frac{1}{2}$ cts. | 15 |
| 4 boxes, at 3 cts. | 12 |
| 14 lbs. of tinning, @ 3 cts. | 42 |
| Labor | 1 25 |
| | $3 06 |

That the last item for labor includes only ordinary labor is apparent from Defendants' Exhibit "List of Labor Items." Mr. Fitch was inquired of (Ques. 30) as to how the defendants' estimated cost of manufacture compared with the cost of manufacturing the plaintiffs' patented hooks, and replied it was about the same.

The testimony as to the cost of manufacture and sale in so meagre and indefinite that I am unable to make any finding as to the extent of the plaintiffs' damages from the loss of profits they would have made if allowed to retain and supply the market of which they were deprived by the unlawful acts of the defendants.

78 I owe an apology to the parties and their counsel, and especially to the court, for the delay in making this report. The evidence was closed and the exhibits in the case sent me on the eve of the summer vacation, and I was asked to delay my report until its close. Since that time circumstances have arisen that have made it impossible for me to report earlier with due regard to the rights of the parties and my own duty in the premises.

I transmit herewith the testimony taken by me and the several exhibits produced by the respective parties and identified. A list of the exhibits is appended hereto.

All of which is respectfully submitted.

Dated at New Haven, this nineteenth day of October, A. D. 1882.

JOHNSON T. PLATT,
*Master, &c.*

Adopted as the final report of the master in the above-entitled cause this 9th day of November, A. D. 1882.

JOHNSON T. PLATT,
*Master, &c.*

79 Fees & expenses of master:

| | |
|---|---|
| 16 days' hearing and deciding, *@* $15 per day | $240 00 |
| 2 copies of draft report for parties, 47 fol. | 4 70 |
| Copy of defendants' suggestions for court | 1 30 |
| Postage | 21 |
| Expressage | 25 |
| | $246 46 |

80 *List of Exhibits put in Evidence at Hearing before the Master, and Accompanying his Report:*

| Description. | Page of testimony. |
|---|---|
| A. Decree in Fitch *vs.* Bragg | Book 1, p. 1 |
| B. Order *de* accounting and reference | do. 1 |
| C. Master's order. | |
| Defendants' Exhibit 1, Defendants' Account | do. 3 |
| Defendants' do. 2 | do. 16 |
| Exhibit D | Book 2, 4 |
| Def'ts' Exhibit "List of Sales" | do. 10 |
| Do. "List of Labor Items" | do. 12 |
| Complainants' Exhibit "Old Snap" | Book 3, 3 |
| Anchor Snap | do. 4 |
| Mosher Snap | do. 4 |
| O. B. North & Co. Snap | do. 5 |
| Def'ts' Exhibit "New Snap" | do. 13 |
| Judd & Blakeslee Snap | Book 4, 4 |
| O. B. North & Co. Snap No. 2 | do. 4 |
| Def'ts' Exhibit "Def'ts' Snap" | do. 5 |
| Complainants' Exhibit "Net Prices" | do. 9 |
| Middletown Snap | do. 10 |
| Complainants' Exhibit Dec. Circular | do. 15 |
| Do. Nov. do. | do. 15 |
| Do. Def'ts' do. No. 1 | do. 16 |
| Do. do. do. No. 2 | ---- 17 |
| Complainants' Exhibit Harness Ring | Book 5, p. 23 |
| do. Complainants' Snap | do. 24 |
| Def'ts' Exhibit Sales of New Snap | Book 6, p. 4 |

81 Also Complainants' Notice *de* Books, dated Feb. 24, 1882.

Defendants' reply to same, dated Feb. 28, 1882.

82 *Accounting before Johnson T. Platt, Master.*

W. & E. T. FITCH *v.* A. N. BRAGG & Co.

Present: For complainants, J. S. Beach, Esq.; for defendants, W. E. Simonds, Esq.

OCT. 19, 1881.

Bill in equity filed 5 May, 1880, upon letters patent, dated May 16, 1865, Chas. B. Bristol, patentee for an improved snap hook, of which plaintiffs became owners Nov. 30, 1865, alleging infringement by defendant.

Defendants' answer admits issuing of patent and denied infringement, and denied Bristol to be inventor, and denied there was any invention.

Decision filed Aug. 6, 1881, marked Exhibit A, copy of opinion.

20th September, 1881. Order of court adjudging patent to be valid and title in complainant, and that the defendant had infringed the first claim, and is entitled to recover profits defendant has made by infringement of first claim, together with damages plaintiff
83 has suffered thereby, and that it be referred to J. T. Platt, as master, to take account and report.

Order laid in, marked "B."

Exhibit "C;" master's order for 14; adjourned to 19 by stipulation.

DEFENDANTS' EXHIBIT 1.

*Def'ts' Account.*

OCTOBER 19, 1881.

ANDREW N. BRAGG, Pine Meadow, sworn:

1. Are you one of the firm of A. N. Bragg & Co., defendants in this suit; and, if so, who are the other members of the firm?

A. I am a member. Robert R. Smith, of New Hartford, is the other member.

2. How long has that firm been in existence?

A. Since May 4, 1879.

3. What has been its business since that time?

A. Manufacture of harness snaps.

4. Do you mean what are known as snap hooks?

84 A. Yes, sir.

5. Have they manufactured anything else but snap hooks?

A. Not to any great extent.

6. To what extent?

A. I am unable to state.

7. What articles have they made besides snap hooks?

A. Bits, a few pocket levels, a few spokeshaves, some machinery; that is all of any importance.

8. Comparing the amounts received from the sale of the articles enumerated by you in your last answer with the amounts received

from the sales of snap hooks, will you please give your best judgment as to the percentage of the former on the total?

(Objected to.)

A. I cannot give any intelligent answer to the question; will say, however, that the proportion of other goods manufactured other than snap hooks was small; it was a small proportion.

85 9. What amount of capital has the company employed since Oct., 1879?

A. I refuse to answer that. I might give my reasons for refus-refusing to answer as I do not think such details of our business are necessary in order to find out how many snap hooks we have manufactured.

10. I will ask you, then, the question you seem to prefer. How many snap hooks has your firm manufactured?

A. From information now at hand I am unable to state.

11. Are you able to state when your firm first began to manufacture snap hooks having a recess in the side of the tongue?

A. As near as I can recollect and learn from my book it was about Oct., 1879.

12. Why do you say about October; do not your books show in what month you began?

A. They do not—that particular form of hook—as we are not in the habit of entering each change in our patterns in our book

86 of account.

13. But do not the entries in your books of account enable you to distinguish between the different patterns as the entries of the sale of hooks appear from time to time?

A. No, sir; not with any greater degree of exactness than I have already given.

13. Will you please repeat the degree of exactness to which you refer?

A. Within the month I have already given you.

14. What class of entries on your books enables you to fix upon the month of Oct., 1879, as the time, or about the time, you began to make hooks with a recess in the side of the tongue?

A. Letters written with reference to the patterns, account of sales, and my recollection of it.

15. My question refers only to entries on your books. As to the class of entries on the books, was there any other class of such entries except account of sales which enables you to distinguish between sales of hooks with a recess upon the tongue from sales of other kinds of hooks?

87 A. None except those already given.

16. Have you already given us any other class of such entries except account of sales; and, if so, what?

A. As given in answer 14; letters written with reference to the pattern.

17. Excluding letters or copies of letters, are there any other classes of entries, except account of sales, enabling you to make the distinction inquired about?

A. None, as given in my answer to your 15- question.

18. Do you mean to be understood that the entries on your books of account, not including in that term letter-books of account of sales, is the only class of entries enabling you to make the distinction referred to?

A. Yes.

19. Do these entries of account of sales enable you to make such distinction to the extent that by looking at any given entry from Oct., 1879, to August, 1880, you can by that entry tell whether
88 or not the hooks then sold had a recess in the side of the tongue or not?

A. They do not, wholly.

20. To what extent do these entries enable you to make the distinction referred to?

A. To the extent taken without any other connection, except as showing the number sold.

21. You mean, then, do you not, that no given entry of account of sales made during this period would by itself show anything except the number of hooks then sold?

A. I mean, as before stated, that we have not kept any special account of the changes of our patterns, and that our books of account merely show how many snaps were sold during that period, and that, unassisted by other books and such recollections as I have when changes were made in patterns, these books of account would not show it if the snaps were made in a dozen different styles.

22. By the term "other books" do you refer to any books other than letter-books; if so, what?

A. None, generally.

89 23. What books do you refer to particularly?

A. Letter-books.

24. If I understand it right, it is principally by the aid of these letter-books that you determine dates when changes of patterns were made. Is that so; and, if not so, what other books aid you in fixing such dates?

A. None, except in one especial case.

25. Please explain your last answer, or, if you do not desire to explain, you may, if you please, consider it omitted from the answer.

A. Strike out "except in one especial case" in the answer to 24-question. Put in "none, generally."

26. What exception do you include under the term generally?

A. Say, date of Oct., 1879.

Recess taken till 2 o'clock.

90 At the conclusion of the noon recess defendants' counsel states that during the noon recess he has learned from his clients, for the first time, that they have made and sold within the time covered by the master's order a form of snap, not included in the return or report this day made by defendants, and not identical in form with the snap which the court passed upon as an infringement, which said form of snap defendants' counsel thinks it quite likely that complainants may claim to be an infringement of com-

plainants' said patent; and defendants' counsel offer to have defendants produce a sample of said form of snap not reported upon as aforesaid, and admits that defendants have made and sold 1,842 gross of said form of snap not reported upon as aforesaid since on or about August, 1880.

27. You said, at the time of recess, that you were specially aided by your letters or letter-book in figuring upon Oct., 1879, as the date when you began to make those hooks with a recess in the tongue. Do you refer to any particular letter; and, if so, what letter?

91 A. I refer to a letter to our foundryman, stating that a pattern had been sent to have castings made from.

28. Who was your then foundryman?

A. I would not like to state positively on that, but it is my impression that it was the Vulcan Iron Works. If not the Vulcan Iron Works, it was Mallory, Wheeler & Co., New Haven.

29. Does a copy of that letter appear upon your letter-book?

A. It is my impression that it does.

30. Is there any doubt about it?

A. No, I can't say that I have any doubt about it.

31. Will you produce at the next hearing the letter-book containing such copy?

A. No, sir; I will not. I will produce a copy of the letter.

(Counsel for complainants insists on the production of the book called for.)

92 (Defendants' counsel desires the master to note that previous to the statement of complainants' counsel just made he desired to make a statement, and that statement is, that he will examine that letter-book, and if it is a thing proper to be produced at this hearing will advise his client to produce it.)

32. Having reference to the statement made by your counsel after the noon recess as to the 1,842 gross of hooks made since August, 1880, what period of time is covered by that statement?

A. The 20th of Sept., 1881.

33. Will you please give us the different sizes of hooks made by you between October, 1879, and September, 1881?

A. We were in the habit of making $\frac{7}{8}$, so called; inch, inch and a half, 3 sizes, but during that time we have made small quantities of other sizes, as follows: $\frac{5}{8}$, $\frac{3}{4}$, $1\frac{1}{4}$, $1\frac{3}{4}$ inches.

34. Will you prepare and produce at the next hearing a statement taken from your books of the respective amount of manufacture and sale of these different sizes during the period covered by the

93 account and by your counsel's statement?

A. Yes.

35. And will you in that statement distinguish and point out how many of such hooks were constructed with a recess in the side of the tongue?

A. I will estimate it at the best of my ability.

36. Can you promise nothing better than an estimate?

A. No, sir; for the reason before stated we have made a great

many changes in our patterns, and, except from memory, it is impossible for me to select the different styles from our book of sales.

37. How many different styles have been made during this period that we are inquiring about?

A. Do not remember.

38. Give us a list of them as nearly as you do remember.

94 A. I must decline to undertake it at present.

39. Can't you give us some of the different styles that were made? I don't now ask for a list of all of them.

A. Not definitely; we might say six, as being a guess.

40. How were those six styles, or any of them, designated; by what name were they known, either to you or to the trade?

A. We have made and put upon the market, as far as the name goes, but one style of snap with swinging tongue. I am therefore unable to further designate them.

41. By what name was this class of snap with swinging tongue known to the trade called by you?

A. New York.

42. How many different styles of snaps with swinging tongue were made by you and sold under this name "New York" during this period?

95 A. All of our different styles except what is known as the Mosher snap, which I desire to except from my answer to the 40th question.

43. Excluding now the Mosher snap, were there any styles of snap with a swinging tongue made and sold by you during this period other than those having a recess in the side of the tongue?

A. Yes, sir.

44. Were these snaps having no such recess in the side of the tongue entered upon your books when sold under the name and title of New York snaps?

A. Yes, sir; all of them.

45. Were the 3,000 gross of snaps made and sold by you during the same period also entered upon your books under the name and title of the New York snaps?

A. Yes, sir. We made no distinction whatever.

96 46. I see that by your account you return the number of sales of snaps adjudged to be infringements made during December, 1879, at 202½ gross. Was that return made from your own personal investigation?

A. No, sir; it was made by my orders, and the order given was to make up a statement from our books showing the total number of New York snaps sold by us during the period named.

47. To whom was that order given?

A. My clerk.

48. Will you be kind enough to give us the name of the clerk?

A. M. J. Page.

49. Have you the statement which the clerk gave you in pursuance of this order?

A. Yes, sir.

50. Will you please produce it?

97 A. I do produce it. (Paper produced, marked Defendants' Exhibit 2.)

51. Are we, then, to understand that the 202¼ gross of snaps appearing by the statement furnished to you by your clerk includes all the snaps with infringing tongues, except the Mosher snap, sold by you during the month of December, 1879, under the name of New York snaps?

A. Yes, sir.

52. Is the same true as to each and all of the different months from Oct., 1879, to August, 1880, inclusive, as set forth in this statement? I mean does the number of snaps set against each month in that statement cover and include all the snaps, except the Mosher, sold by you during those months respectively, having swinging tongues?

A. Yes, sir.

53. Did the 1,842 gross of snaps referred to in the statement of counsel as having been made and sold since August, 1880, have swinging tongues?

A. Yes, sir.

98 54. Were they sold under the same name and title of New York snaps?

A. Yes, sir.

55. Did you during the period covered by the last question sell any snaps having a swinging tongue, except the Mosher snaps, under the name of New York snaps, except those embraced or intended to be embraced in the 1,842 gross?

A. Yes, sir.

56. What kind of snaps were those that you so except from the 1,842 gross?

A. Various styles of New York snaps, so called. I am unable to state the difference in style and quantity of each style.

99 57. Did all those styles sold during this period by you under the name of New York snaps have a recess in the side of the tongue?

A. No, sir.

58. What proportion had such recess?

A. I would not undertake to state with any degree of exactness.

59. Are they sold at the same price, whether they had or had not the recess in the side of the tongue?

A. As near as I can remember, they were certainly sold — no less.

60. Do you remember whether they were sold for any more?

A. They were not probably.

61. Can you tell from your books what proportion had the recess upon the side of the tongue?

A. No, sir.

100 62. Can you give us the number of snaps having a recess in the side of the tongue sold each month after August, 1880, to September, 1881, respectively?

A. No, sir.

63. Why not?

A. As before stated, we were not in the habit of putting down any changes made in our patterns from time to time—made no other account of them, and, therefore, know nothing about it now. Nor do we know any way of finding out the desired information.

64. Will you produce at the next hearing a statement of the number of snaps having a swinging tongue, except the Mosher snap, sold by your firm since its formation, under the name of New York snaps, giving a list of sales, with date of purchase, quantity sold, name of purchasers, and prices, designating which, if any, of these snaps, known as New York snaps, had no recess in the side of the tongue?

(Objected to as going outside of the proper province of this accounting, and that these defendants should not be compelled
101 to disclose to the complainants, their competitors, the details of the defendants' business in snaps not having a recess in the side of the tongue, and particularly the names of their purchasers of these non-infringing snaps.)

(Complainants' counsel disclaim any desire to inquire into the details of the defendants' business or the names of their customers for any purpose other than to acquire the desired information, which the witness says he does not know or has any way of finding out.)

A. No, sir; for the reason, as heretofore stated, that it would be impossible for us to make up such a statement, and for the further reason that we do not consider the names of our customers necessary for the proper accounting in this case.

65. Would it not be quite possible for you to make up from your books a list of sales of New York snaps, giving the date of purchase, quantity sold, names of purchasers, and prices?

A. No, sir.

66. Please explain wherein the difficulty lies?

102 A. We have not been in the habit of making any entry of date of purchase, nor have we received, except in possibly a very few instances, any amount like the amount charged for goods. A statement made up, therefore, based on which the goods were billed at would not in one case out of a thousand show what we received for them, and what we received is, as we consider it, the net price at which they were sold.

67. I was not undertaking to weigh the effect of such statement, but I want to know if you will produce at the next hearing a copy from your books of the list of sales of the New York snaps, with the exception above noted, sold during this period, giving, when you can, the date of purchase, the name of purchaser, the quantity sold, and the price at which they were billed?

A. No, sir; we object to giving our competitors any information that might result in any way to the disadvantage of our customers.

68. Will you produce at the next hearing a list of the different sizes of snap hooks having swinging tongues, other than the
103 Mosher hook, made and sold by you during this period, and the computation by which the average of 14 lbs. of iron per gross is arrived at?

A. It will be impossible for us to select out all the Mosher hooks, but we will produce a statement showing how our estimate is made up.

69. In your statement of the cost of labor on the infringing hooks you put it at a dollar and 25 cents per gross. Did you pay for that labor by the piece or by the day?

A. By the day.

70. Will you produce at the next hearing a statement of items showing how much you estimate the labor to be for the bending of and milling, putting together, and packing, respectively, and the details and figures of various calculations by which you arrive at the cost of labor for milling, bending up, putting together, and packing?

A. We can give you no closer estimate than is given in our estimate of $\$1\frac{25}{100}$ for general labor.

104 71. Do you mean that you reached that estimate of $1.25 for labor without any items guiding you to a result?

A. No, sir; but the items consist of merely generalities, estimates, and suppositions, for the reason that for work being done at that time by the day, employees constantly changing, and of course changing cost of labor, one cannot make you up a detailed statement, except as stated in an estimate. The items contained therein, otherwise than the labor, are, of course, a self-evident cost.

72. The items which go in to make up the cost of labor on the snap are the bending up, the milling, the putting together, and the packing, are they not?

A. They are all the labor we had to do on the snap.

73. Will you produce at the next hearing your estimate of the cost of these respective items of labor, and the details of figures by which you arrive at the result?

105 A. As this question is substantially the same as No. 70, I make you the same answer, viz: "We can give no closer estimate than is given in our estimate of $1.25 for general labor," for the reason as heretofore stated in our answer to No. 71.

74. I understand, then, that you decline to give us any of the details in your estimate for labor of the cost of bending up the snap; is that so?

A. Yes, sir; as we do not consider that the cost of bending up our snaps, either now or heretofore, has any bearing upon this case.

75. Do you also decline to give any details of your estimate of the cost of labor upon the remaining three items?

A. We shall be happy to give you any details regarding the cost of a tongue used in making our snaps that it is in our power to give.

76. Does the cost of the tongue form any part of the $1.25 you have charged for labor?

A. Yes, sir.

106 77. In which of these four items of bending up, milling, putting together, and packing is the cost of the tongue included?

A. Putting together and packing and the general labor.

78. What proportion of the cost of labor in packing is due to the cost of the tongue?

A. I am unable to state, as they are not packed separately.

79. What proportion of the cost of labor for putting together is due to the cost of the tongue?

A. We are unable to state that; we have never made any calculation about it, and could not undertake a task requiring so much mathematical ingenuity.

(Complainants' counsel desires witness, between now and next hearing, to do the best he can in giving the details of the items, aggreting $1.25 per gross for labor, as stated in his account.)

80. Will you please produce at the next hearing your bills or invoices containing the prices of iron charged for at 8 cts. per
107 pound, and for boxes charged at 3 cts. a piece?

A. We must again object to the production of any details of our business, or giving the names of parties of whom we have bought goods or parties to whom we have sold goods. We are ready and willing to produce, as already produced, a statement showing the cost of iron, boxes, brass, tin, or anything else going to make up the cost of our work; but we decline to give any names of parties from whom those goods were purchased. We do this not in any sense to evade the inquiry, but we think it unjust and unasked for.

81. Will you produce at the next hearing statement showing the sales by months, respectively, of the 1,842 gross of snaps by which your account, as rendered, was supplemented by the statement of your counsel after the noon recess?

A. Yes, sir.

Adjourned by consent of parties to Nov. 15, 10 a. m.

Nov. 15.

Adjourned to Nov. 25, 10 a. m.

108 NOVEMBER 25.

Hearing continued.

Present: For complainant, J. S. Beach, Esq.; for defendant, Jared B. Foster, Esq.

THERON H. CAMP, New Britain, sworn:

I am secretary and treasurer of the Vulcan Iron Works, New Britain. That corporation has carried on business for about 4 years. Manufacture and sale of malleable iron castings is the whole of our business.

1. Has your company had any dealings with A. N. Bragg & Co., of Pine Meadow?

A. Yes; we have sold them goods.

2. Can you give us the date of the first order you received from them, and what it was for?

A. I cannot from memory, but I have the memoranda. The first shipment was April 22, 1880.

3. What is the memorandum by which you refresh your recollection as to date of the first order?

109 A. It is a memorandum drawn off by our book-keeper of the amount of goods we had shipped them.

(Plaintiffs' counsel puts in evidence memorandum marked Exhibit D.)

Admission of Exhibit D objected to by defendants' counsel.

4. The exhibit shows that the first shipment was made Ap'l 22, 1880. Have you the order upon which that shipment was made? And, if so, produce it.

A. I think the order was March 24th, which I produce. Produced, marked Exhibit $E^1$.

Admission of exhibit objected to by counsel for defendant.

(It is understood that all orders produced by the witness come in under the same objection as above.)

5. What is the next order, in date, which you have, and if you have more than one, please produce them all.

Witness produces and complainants' counsel puts in evidence the following orders:

110 Ap'l 9, 1880, marked $E^2$.
Ap'l 8, do., do. $E^3$.
June 4, 1880, marked $E^4$.
June 16, do., do. $E^5$.
June 28, do., do. $E^6$.
July 12, do., do. $E^7$.
Aug. 29, do., do. $E^8$.
Aug. 13, do., do. $E^9$.
Sept. 25, do., do. $E^{10}$.
Oct. 22, do., do. $E^{11}$.
Nov. —, do., do. $E^{12}$.
Jan'y 22, 1881, do. $E^{13}$.
Jan'y 25, do., do. $E^{14}$.
Jan'y 25, do., do. $E^{15}$.
Feb'y 1, do., do. $E^{16}$.
Feb'y 5, do., do. $E^{17}$.
Jan'y 13, do., do. $E^{18}$.
M'ch 12, do., do. $E^{19}$.
M'ch 14, do., do. $E^{20}$.
Ap'l 13, do., do. $E^{21}$.
Ap'l 25, do., do. $E^{22}$.
Nov. 13, 1880, do. $E^{23}$.
Nov. 22, do., do. $E^{24}$.

6. I see in Exhibit D the first column is headed old tongues. What do you understand by that designation?

111 A. That is his term of ordering—he called them by that name.

7. Were all the tongues which appear in that exhibit under that designation as old tongues the same in construction, except as they differed in size or weight?

A. I can't say as regards that. Our superintendent, Mr. Oldershaw, has charge of that department.

8. The headings of the other four columns are termed, respectively, "new tongues," "old snaps," "new snaps," "latest tongues." Do these headings correctly represent the name and style under which the castings were ordered or sold?

A. That was the way we designated them on our books. The N. Y. snaps were all the same price.

9. What kind of hook do you understand is included under the term N. Y. snap?

A. I don't think I could explain it. I paid very little attention to that department.

112 10. Do you know whether these snaps included in Exhibit D had a swinging tongue when finished?

A. I have not seen a finished snap for a long time. If I could see a snap I could tell better. I think they had a swinging tongue.

By consent of parties, hearing continued to Tuesday, December 20, 10 a. m.

J. T. PLATT, *Master.*

DEC. 20, 1881.

Present: Mr. Beach, for complainant; Mr. Simonds, for defendant.

Complainants give notice to defendants that they will present no further testimony upon the question of profits, and that upon that branch of the case the complainants' testimony is finished.

Adjourned, by consent of parties, to Jan'y 3, 10 a. m.

J. T. PLATT, *Master.*

JAN'Y 3D.

Adjourned to January 9th at request of Mr. Simonds, by consent of parties.

J. T. PLATT, *Master.*

113 JANUARY 30, 1882.

Defendant proceeds on question of profits.

A. N. BRAGG, sworn:

1. What is partner's main business, and who practically carries on the business of your firm, A. N. Bragg & Co.?

A. My partner, Mr. Smith's, main business is his position as agent of Greenwood's Co., and I practically carry on our business.

2. When did the defendants entirely cease making and selling snap hooks, if any, and all kinds having a side recess and a swinging tongue?

A. Some time in July or August, 1881; I could not positively state when.

3. Have you here and will you produce a list of all sales of snap hooks with swinging tongues that defendants ever made and sold up

to the time defendants entirely ceased selling snap hooks having the side recess in a swinging tongue?

Objected to by counsel for complainant for the reason that the witness has already refused to give the information called
114 for by the question upon his examination-in-chief, or to produce his books furnishing such information, and it is now too late for the defendants, after the complainants have closed their testimony, to open the inquiry anew.

(Defendants' counsel does not understand that defendants have ever refused to produce the list now called for, and says that this was prepared for the express purpose of giving all possible light as to various requests made by plaintiffs' counsel, and asks for the master to note that defendants have produced all of their books of account here and still have them here for examination.)

A. I have and produce it. Produced and marked Def'ts' Exhibit "List of Sales."

4. 3,667¼ gross is the total shown upon Defendants' Exhibit "List of Sales," is it not?

A. Yes, sir.

5. Is there any way of telling accurately from your books or otherwise how many of said 3,667¼ gross of snaps had a swinging tongue with a side recess?

115 A. I have given the subject a great deal of attention, and can say positively that there is no way to distinguish the different styles of snaps we made by our books or in any other way.

6. Can you, and, if you can, will you, name a number or quantity of those snaps which you feel positive will include all that defendants have ever made and sold having a side recess in a swinging tongue?

Objected to by complainants' counsel as the witness has already testified as to the subject-matter of this inquiry, and the complainants have closed their case upon the question of profits upon the faith of such testimony.

A. My answer to that question is that we have produced a statement, and am positive now that the number given in that statement of 3,000 gross is substantially correct.

7. Have defendants made any profit on their manufacture and sale of snaps included in said Defendants' Exhibit "List of Sales"?

A. No, sir; we have not.

116 8. Can you and will you produce an estimate of a list of items which go to make up the $1.25 per gross for labor mentioned in a paper already made by defendants in answer to a requirement of the master?

A. I made such an estimate at the request of Mr. Beach, and now produce it. (Produced, marked Defendants' Exhibit "List of Labor Items."

9. Are or are not the items of Defendants' Exhibit "List of Labor Items" substantially correct?

A. They are.

10. What is an average size of the hooks made and sold by defendants having a side recess in a swinging tongue, and included in Defendants' Exhibit "List of Sales"?

A. Size known as one inch.

11. What does a gross of the inch snaps weigh?

A. 14 lbs.

12. What does a gross of inch tongues with side recess weigh?

117 A. About 2 lbs.

13. What does a gross of the springs for the inch snaps weigh?

A. About 5 ounces.

14. What is the cost of the labor of making a gross of the springs for the inch snaps?

A. About 5 cents.

Defendants' counsel gives notice that at the argument on this accounting before the master and before the court he will make use of all exhibits filed by either party in the trial on the merits of the case.

Complainants' counsel accepts the notice, and gives notice to defendants' counsel that he will do the same.

15. What is the difference in weight net, the tongue of a snap of the Bristol patent, inch size, and another tongue, same size, but with the open side of the recess closed so that the construction is like that in Complainants' Exhibit Old Snap, supposing the added ear to be of the same thickness as the one ear of the Bristol tongue, as complainants make the Bristol tongue?

118 A. 13 grains, apothecaries' weight.

16. When two ears are thus used, as in Complainants' Exhibit "Old Snap," does or does not each ear need to be as thick as the one ear of the Bristol tongue, as complainants make the Bristol tongue?

A. If two ears were used they would be much thinner than if only one ear was used.

17. And in case two ears were thus used, still keeping to the inch size of snap, and comparing with the Bristol tongue, as made by complainant, what would be an ample allowance for the increased weight that the two ears would have over the one ear of the Bristol tongue?

A. 5 graines, apothecaries' weight.

Cross-examined by Mr. BEACH:

1. Referring to exhibit just laid in, marked Defendants' Exhibit "List of Sales," I observe a list given of individuals and of firms, but with no heading; will you please tell us what that list is intended to indicate?

119 A. It is intended as an answer and list in response to a question of our counsel. (Question No. 3.)

2. Do you mean that the list of names and firms therein contained, beginning with the name of Smith, Seltzer & Co., indicates the

names of purchaser of snap hooks from your firm during the period covered by the statement?

A. Yes, sir.

3. Will you please look at the list of purchasers and indicate which of them purchased from you during that period snap hooks which did not have a swinging tongue with a recess in its side.

A. I am unable to state.

4. And are you also unable to state which purchasers named in that list purchased from you during the period covered by the statement snap hooks which had a swinging tongue with a recess in its side?

A. Yes, sir; I could not state any nearer than my estimate of 3,000 gross, as covering the entire number.

120 *Complainants' Case on Question of Damages.*

WM. E. FITCH, sworn:

1. You are one of the firm of W. & E. T. Fitch, complainants, are you not?

A. I am.

2. When, if at all, during the past two years, did your firm make any change in the price of the Bristol patented snap hooks which are the subject-matter of this suit?

A. In Dec., 1880.

3. Was that change made in the list price or in the rate of discounts from the list price?

A. In the rates of discount.

4. What was the list price at that time on the three classes of hooks known as $\frac{7}{8}$ inch and $1\frac{1}{2}$ inch, respectively?

A. $\frac{7}{8}$ and 1 inch, $10 per gross; $1\frac{1}{2}$ inch, $14 per gross.

121 5. What had been the rate of discount from their list prices fixed and allowed by your firm prior to Dec., 1880?

A. 50 per cent. and 10 per cent.

6. What was the rate of discount allowed after the change made in Dec., 1880?

A. 60 per cent.

7. Taking the sum of $10 per gross as an illustration, what would be the difference between a discount of 50 per cent. and 10 per cent. as compared with a discount of 60 per cent.?

A. 50 cents per gross.

8. What was the cause of this change in the rate of discount?

A. Competion of the infringing snaps made by the defendant.

9. Was there any other cause within your knowledge for making the same?

A. There was not.

122 10. What was the number of gross of these patented Bristol snap hooks sold by your firm during the year 1879?

A. 9,695 gross.

11. What was the number of gross sold during 1880?

A. 6,914 gross.

12. What was the number sold during 1881 up to Sept. 20 of that year?

A. 7,607 gross.

13. What snap hooks of this class—that is, having a swinging tongue, with a recess in the side for the admission of a spring—were there during 1879 and 1880, and up to Oct., 1881, competing in the market with your patented snap other than those made and sold by the defendants?

A. I know of no other.

14. In which feature of the patent does the value of the patented snap as a finished article reside; I mean the feature that
123 gives it its marketable value over other snap hooks?

A. In the tongue.

15. How did your facilities for manufacturing these hooks, having reference both to the quality and quantity of the product, compare in 1880 and 1881 with those you had in 1879?

A. They were the same.

16. During the period covered by this accounting could you have manufactured, in addition to the snaps you did manufacture, and without any increase of your manufacturing facilities, all the snaps manufactured by the def'ts assuming that use to have been 3,000 gross?

A. We could.

17. Have you examined the list of purchasers contained in Defendants Exhibit "List of Sales," which was put in evidence by them this morning?

A. I have.

124 18. Will you please give the result of that examination, having reference especially to the question as to how far you find in that list the names of customers of your firm to whom prior to the defendants' competition you had sold your patented snap hooks?

A. I find in all 198 sales made to 81 distinct firms, and of the 81 we have sold regularly to 59.

19. What prices to the reduction of which you have spoken as having been made in Dec., 1880, was your net price on these patented hooks of the sizes $\frac{7}{8}$, 1 inch, and $1\frac{1}{2}$, respectively?

A. $4.50 on $\frac{7}{8}$ and 1 inch, and $6.30 for $1\frac{1}{2}$ inch per gross.

20. Now, please give the net price on these different sizes, respectively, for which you sold the patented hooks after the reduction made in Dec., 1880.

A. $\frac{7}{8}$ and 1 inch, $4.00 per gross; $1\frac{1}{2}$ inch, $5.60 per gross.

21. Were these prices you have given as being net prices after the reduction uniformly adhered to by you during the period covered by the accounting.

125 A. They were without an exception.

22. What degree of similarity was there between the patented hooks and the hooks made and sold by the defendants during the period covered by this accounting in their general appearance and mode of operation?

A. Nearly identical.

Adjourned to Tuesday, Feb'y 7, 10 a. m.

Adjourned to Tuesday, Feb'y 14, 10 a. m.

FEB'Y 14, 1882.

Proceed with the examination of Mr. FITCH:

Present: Mr. Beach, and Mr. Foster, and Mr. Simonds.

23. At the last hearing before the master, Jan'y 30, the defendants put in evidence an Exhibit "Account of Sales," and I then asked you some questions in regard to it; have you during the interval made a careful analysis of that exhibit as compared with your own hooks?

A. I have.

126 24. What is the number of sales that exhibit shows to have been made by the defendants?

A. 197.

25. To how many different firms?

A. 90.

26. How many of those 90 firms or persons are your customers; I mean not general customers, but regular permanent purchasers of your patented Bristol snap hooks?

A. 63.

27. How many gross of snap hooks appear by that exhibit to have been sold to such customers by the defendants?

A. 3,126 gross.

28. What proportion of this 3,126 gross sold to your customers by the defendants appear by that exhibit to have been sold before Dec. 1, 1880?

A. 1,984$\frac{3}{4}$ gross.

127 29. Can you give the number of gross of the respective sizes making this aggregate of 3,126 gross?

A. I can. 44 gross, $\frac{5}{8}$; 133$\frac{3}{4}$ gross, $\frac{3}{4}$; 1,063$\frac{1}{4}$ gross, $\frac{7}{8}$; 1,078$\frac{1}{2}$ gross, 1 in.; 156$\frac{1}{4}$ gross, 1$\frac{1}{4}$ in.; 632$\frac{1}{4}$ gross, 1$\frac{1}{2}$ in.; 18 gross, 1$\frac{3}{4}$ in.

30. Mr. Bragg, in his testimony, estimated cost of manufacture of defendants' infringing hooks at $3 per gross on an average of different sizes. How does this compare with the cost of manufacturing your patented hooks?

(Objected to, that complainants counsel have elected to have this inquiry proceed in two branches, 1st, defendants profits; 2d, complainants damages. That he has closed the first branch, and this inquiry is not applicable to that branch; therefore inadmissible.)

A. It was about the same.

31. Mr. Bragg says the average size of the hooks manufactured by the defendants is one inch, and that the sizes are in the proportion of $\frac{2}{3}$, 1 inch and under, $\frac{1}{3}$ over an inch. How does this compare with your line of manufacture with reference to proportion of sizes made?

128 (Objected to, as the evidence of Mr. Bragg is misstated, as defendants counsel understands it.)

A. That is the same as the average; it is about the same.

32. What was the number of gross of patented Bristol snap hooks sold by the complainant between December 1, 1880, and September 20, 1881?

A. 7,697 gross.

33. You gave at the last hearing the number of gross of the patented hooks sold during the year 1881, and up to September 20th of that year, as being 7,607. Does that statement need correction; and, if so, please give it.

A. It does. The current number is 7,135 gross.

34. Since that last meeting you have also called my attention to the fact that one or two small items affecting the net price of your patented hooks escaped your notice on that hearing. What are the items to which you refer?

A. The item of freight and the contingent discount of 2 per cent. for cash in 10 days.

129 35. Taking these two items into the account, please give a corrected statement of the net price per gross of the sizes of the 1 inch and under before the reduction which you have testified was made, in December, 1880?

A. $4.36 *dollars* per gross.

36. What was the net price after the reduction on these sizes?

A. $3.82 per gross.

37. What was the net price of 1¼ inch before Dec. 1, 1880.

A. $5.65½ per gross.

38. And what was the net price on this size after that time?

A. $5.02 per gross.

39. What was the net price on the size 1½ inch prior to December 1, 1880?

A. $6.05½ *dollars* per gross.

130 40. What was the net price on that size after that period?

A. $5.36 per gross.

41. What was the net price on the sizes 1¾ in. before December 1, 1880, and what was the price after?

A. $6.46 before; $5.72½ after, per gross.

FEBRUARY 14, 1880.

Cross-examination of Mr. FITCH by Mr. SIMONDS:

42. In your 8th and 9th answers you say that you lowered the price of your snaps because of the competition of infringing snaps made by the defendants. You mean, do you not, that complainants lowered the prices of their snaps because they found their sales decreasing, and they attributed that decrease to defendants' competition?

A. I do.

131 43. During all the time that defendants were selling snaps having a side recess in a swinging tongue various other manufacturers aside from complainants and defendants were making and selling snaps with swinging tongues in the same markets of the U. S. with you, were they not?

A. They were.

44. Will you give the name and locations of such of them as you can now remember?

A. Judd & Blakeslee, of New Britain, Conn., successors to Middletown Tool Co., of Middletown. I don't recall any others.

45. Were not the Anchor Snap Co., of Northford, Conn., so doing?

A. Not to my knowledge.

46. Has not your concern written that company, complaining of infringing of the Bristol patent?

A. We have, some years since.

47. Did they ever desist or hold up in any manner?

A. I supposed they did.

132 48. Is it not within your knowledge that the Anchor Snap Co. were putting snaps with swinging tongues in the market during the time that defendants were making and selling snaps with swinging tongues having a side recess?

A. Yes.

49. The Judd & Blakeslee concern were and are very heavy manufacturers of snaps, were and are they not?

A. I do not know.

50. Did George D. Mosher, of Birmingham, Conn., make and put snaps on the market during the period covered by this accounting?

A. I do not know that George D. Mosher did.

51. Was there a concern at Birmingham, Conn., that did?

A. I have understood so.

133 52. Did you not have actual knowledge of the snaps of this concern being in the market during the period covered by the accounting?

A. I did not.

53. Did not your concern receive letters from customers during the period covered by the accounting mentioning the snaps of the Birmingham concern?

A. Not to my recollection.

54. The snap put in evidence as Complainants' Exhibit "Old Snap" is one of the Judd & Blakeslee make, is it not?

A. I so understand it.

55. Can you identify the snap I hold in my hand as a kind of snap made and sold by the Anchor Snap Co. during the period covered by the accounting?

A. I think it is similar.

(Snap referred to offered in evidence and marked "Anchor Snap.")

134 56. Can you identify the snap I hold in my hand as the snap made and sold by the Birmingham concern during the period covered by the accounting?

A. I have never seen a snap like that before, and cannot identify it.

(Snap put in and marked "Mosher Snap.")

57. Do you not know of still another concern that made and sold snaps with swinging tongues during the period covered by the accounting?

A. I do not, if the question refers to a snap with a coiled spring.

58. These snaps referred to as made by Judd and Blakeslee, by the successor to the Middletown Tool Co., by the Anchor Snap Co., and by the Birmingham concern all had coiled or tortional springs, did they not?

A. The first, or Judd & Blakeslee, had; the second, or Middletown Tool Co., as I remember it, had not; the third, the Anchor snap, had; the fourth, the Birmingham snap, I know nothing of by that designation.

135 59. During the period covered by the accounting were O. B. North & Co., of New Haven, making and selling snaps with swinging tongues?

A. Not to my knowledge.

60. Did O. B. North & Co. ever make or sell snaps under any license or other arrangement from your concern or with the owners of the Bristol patent?

(Objected to as calling for evidence relating to a period outside of that covered by the accounting.)

A. Not to my knowledge.

61. Do you recognize the snap I hold in my hand as made by O. B. North & Co.?

A. I recognize it as similar to snaps made by O. B. North & Co.

(Put in evidence and marked as the "O. B. North & Co. Snap.")

(Above question is subjected to same objection as preceding one.)

62. Did snaps such as that last offered in evidence appear in the market as the manufacture of O. B. North & Co. during the period covered by the accounting?

136 A. I do not know.

63. When did you know of O B. North & Co. making and selling such snaps?

A. Fifteen years ago.

64. Do you mean before the Bristol invention?

A. No, sir.

65. Did O. B. North & Co. make that snap by arrangement with your concern, or the owner of the Bristol patent, or by the permission or acquiescence of either?

(Objected to as going more than ten years back of the period covered by the accounting.)

A. They did not, to the best of my knowledge.

66. The O. B. North & Co. snap has a recess in the side of the tongue opening outward combined with a coiled spring, which rests in such a recess and operates between the body of the hook and the tongue, has it not?

(Objected to, first, because the exhibit speaks for itself; and,

second, because it appears that the exhibit represents a style
137 of hook sold on the market years before the period covered by the accounting.)

A. This exhibit snap has.

67. Would you not know whether O. B. North & Co. ever made such snaps by arrangement with W. & E. T. Fitch?

A. I think I would.

68. And do you desire to be understood positively that they never did?

(It is understood that all questions relating to period not covered by the accounting are taken subject to objection for that reason, without repeating when the question is put.)

A. I do, to the best of my knowledge.

69. And do you also desire to be understood that you do not know of such a snap as the O. B. North & Co. snap appearing on the market in the last 10 years as the make of O. B. North & Co.?

A. No, sir.

138 70. How late did such a snap appear on the market, to your knowledge?

A. I can't say.

71. Did it not so appear as late as the period covered by the accounting?

A. I have no definite knowledge concerning it.

72. Have you not such a knowledge thereof as comes by customers' letters and conversation with customers and such as comes through the ordinary channels of trade; that as late as the period covered by the accounting such a snap appeared on the market?

A. I have not.

73. Can you say that such a snap did not appear on the market such as made by O. B. North & Co. during the period covered by the accounting?

A. I cannot.

74. Can you say, from your own knowledge, that the sales
139 of the snaps with swinging tongues made and sold by manufacturers other than defendants' did not have something to do with decreasing your sales of snaps, as you have testified.

A. I cannot.

75. Will you please state fully *apropos* of your 14th ans., how, "as a finished article" the peculiar and patented tongue of the Bristol snap gives the snap its marketable value; how, as a finished snap, does it differ in operation from Complainants' Exhibit "Old Snap?"

(Question objected to as embracing two distinct questions, the last of which is specially objected to as irrelevant. The first is not objected to.)

(Witness' 14- question and answer read witness.)

A. Without it the snap would have no commercial value. I am not familiar enough with the Exhibit "Old Snap" to tell how it differs. We have not it here.

76. Will you fully explain how a side recess in the tongue of the snap in the Bristol patent gives to the snap "as a finished article" its marketable value?

140 (Objected to as calling for testimony of the witness as an expert, he not having been examined as a witness in that capacity.)

A. As I said before, it, the hook, has no value without the tongue.

77. The same is true of the "Anchor Snap," the "Mosher Snap" and the "O. B. North & Co. Snap," is it not?

A. It may be.

78. Do you mean by your last answer but one that the snap hook is inoperative if the tongue be not present?

A. It is inoperative for its designed purpose.

79. The snap hook would also be inoperative for its design and purpose if the tongue and spring were present and the hook body were absent, would it not?

A. I presume it would be.

80. How, then, does the tongue of the snap of the Bristol patent give to the snap "as a finished article," its marketable value

141 any more than the hook body gives that marketable value?

A. The value is contingent upon the presence of the combination, and the tongue is the key to it.

81. Can you give any reason, other than mere assertion, why the tongue of the snap of the Bristol patent gives any more marketable value to the snap "as a finished article," or to what you have pleased to call the combination, than the hook body does.

A. Its success in the market demonstates it.

82. Did you ever sell the tongue separate in the market?

A. No, sir.

83. How, then, do you know what relative value the market gives to the tongue as regards the value it gives to the hook body?

A. I don't suppose that separated there is any marketable value to either.

142 84. Do you know whether in the same time you have sold more or less of your Bristol snaps than Judd & Blakeslee have of theirs?

A. I have no means of knowing.

85. Then what do you mean by your answer to the 14th question?

(Question and answer read witness.)

A. I mean what I said—that the tongue gives it its market value.

86. As your 14th answer reads, it is to the effect that the tongue in the snap of the Bristol patent gives to the snap, as a finished article, its marketable value over snap hooks. In your 81-ans. you say of your hook that "its success in the market demonstrates it," and in your 84-ans. you say that you don't know what its success in the market, as compared with Judd & Blakeslee's, is. Can you now give any other reason for your answer to the 14-question than that it is based upon your opinion?

(Objected to as being metaphysical and argumentative both.)

143 A. The question is somewhat involved. If you will repeat the question——

Question repeated.

[A.] I cannot.

87. How many, to your knowledge, of the 59 firms mentioned in your 18- ans., or of the 63 firms mentioned in your 26- ans., did not also buy snap hooks with swinging tongues of other manufacturers than you prior to the time that defendants' competition began?

A. I have no knowledge concerning it.

88. How many, to your knowledge, of the 59 firms mentioned in your 18- ans., or of the 63 firms mentioned in your 26- ans., did not, during the period covered by the accounting, buy snap hooks with swinging tongues of other manufacturers than you and the defendants?

A. I don't know.

89. To how many of the 59 firms mentioned in your 18- answer, or of the 63 firms mentioned in your 26- answer, did you sell snap hooks with swinging tongues, having recess in the side, after Oct., '79, and before Sept. 20, '81?

144 A. It is safe to say that we sold to all.

90. Will you now give the number of snaps made and sold by W. & E. T. Fitch during the year 1879 containing the improvement described in C. B. Bristol's patent on snap hooks, No. 47764, dated May 16, 1865, and referred to in the first claim of that patent; also the number of such snaps made and sold by W. & E. T. Fitch during the year 1880; also the number of such snaps made and sold by W. & E. T. Fitch in A. D. 1881 up to Sept. 20 of that year?

Ans. I cannot.

91. Have you not undertaken so to do in your 10th, 11th, & 12th answers?

(Same read to witness.)

Ans. Not as I understand it.

92. What did you undertake to give in your 10th, 11th, & 12th answers?

A. My answer referred to Bristol's patent snaps with recess in the side of the tongue.

145 Recess until 2 p. m.

93. Do you mean the recess of the tongue described in C. B. Bristol's patent, dated May 16, 1865?

A. I do.

94. Then why can you not answer question 90?

A. I misunderstood the question; I can now answer it. As to 1879 the number manufactured and sold was 9,695 gross. During 1880 sold 6,914 gross. In A. D. 1881, up to Sept. 20, 7,135 gross.

95. Can you and will you state how many such snaps have been made and sold by W. & E. T. Fitch since Sept. 20, 1881, up to January 1, 1882?

Ans. 2,217 gross.

96. The numbers that you have given in your last two answers are taken from your books of account, are they not?

Ans. They are.

146 97. Were not your decreased sales of snaps due in some measure at least to the fact that you were attempting to introduce a new form of snap into the market.

A. I did not think so.

98. It is a fact, is it not, that W. & E. T. Fitch have been making and selling a snap having such a tongue and spring and body as that I hold in my hand?

A. It is.

(The same is offered in evidence, and marked "Def'ts' Ex. New Snap.")

99. Have you included in the figures given by you in answers to 94- &- 95 ints. the snap hooks made and sold by W. & E. T. Fitch the same in construction as Def'ts' Ex. "New Snap?"

A. I have.

100. Can you tell how many like Defendants' Ex. "New Snap" you have made and sold in the period covered by def'ts' accounting?

147 A. I cannot at the present hearing.

(Def'ts' counsel requests the witness to give at the next or convenient hearing the number of snaps made and sold by W. & E. T. Fitch like Def'ts' Ex. "New Snap" from Oct., '79, up to Feb'y 1st, 1882, separating the number for each callendar year.)

101. I conclude by your including in your figures the snaps like Defendants' Exhibit "New Snap" that you and your firm consider such new snap to be covered by the 1st claim of the Bristol patent of May 6, 1865. Am I right in such understanding?

A. You are right.

102. Do you deliberately say that the introduction of a new form of snap into the market has no tendency to decrease the sales?

A. I say it deliberately and emphatically this instance has not.

103. Does not the public generally need to be educated up to the use and consumption of a new thing?

148 A. I can't say.

104. When did you begin to put snaps like Defendants' Exhibit "New Snap" on the market?

A. If my recollection serves me, it was in Aug. or Sept., 1880.

105. And that was the very year that you experienced your first decrease in sales of snaps, was it not?

A. It was the year.

106. For the year preceding Oct., 1879, what were your prices and discounts on these Bristol snaps?

A. I think from—I should say that they were 50, 10 and 10 up to Oct., 1879, for ten months.

107. You raised from 50, 10, 10 in Oct., '79, up to 50 and 10, did you not?

A. We did.

149 108. Will you give the net prices of the different sizes of snap- under the discounts which ruled in your concern prior to Oct., 1879?

A. $\frac{7}{8}$ inch, 4.05 per gross.
1 " 4.05 "
$1\frac{1}{2}$ " 5.67 "

109. Will you state the difference between those prices and the discount of 60 per cent.?

A. Difference in $\frac{7}{8}$ in., 18 cts. per gross.
" " 1 " 18 " "
" " $1\frac{1}{2}$ " $30\frac{1}{2}$ " "

110. Is it not a fact that in 1880, when your sales fell off, you were not trying to sell your snaps at a greater price than you were prior to Oct. 20, 1879?

A. The price had been advanced.

111. And did your customers not find fault with you because you made such advance, and do you not think and know that had you not made the advance you would have sold as many, or nearly as many, snaps as you did in 1879?

150 A. I do not think so; for if my recollection serves me the falling off was prior to October, 1880.

112. Can you and will you give me the sales of the patented Bristol snaps by months from Oct. 1, 1879, to January 1, 1881?

A. I think we can, and I will try to do so at a future hearing.

113. Has it not been the rule, in your experience, that an advance in prices has retarded sales for a time?

A. No, sir; it has stimulated trade more frequently.

114. Do you consider that as a rule that holds good in business?

A. I do sometimes.

115. That is, you mean when the state of trade is favorable to an advance in prices?

A. I do. I should not make it at any other time.

151 116. What was there about the state of trade at the time you made the advance testified to which warranted it, suppose it to be in Oct., '79?

A. It was the unusual demand, and increased prices of material.

Hearing adjourned until Tuesday, Feb'y 21, 1882, at 10 a. m.

152 FEB'Y 21, 1882—10 a. m.

Cross-examination of Mr. FITCH continued:

117. Can you, and will you, now give, as requested at the last hearing, the number of maps made and sold by W. & E. T. Fitch like Def't's Ex. New Snap, from Oct. 1, 1879, to Feb'y 1, 1882, separating the number for each calendar year?

A. I can and will do so, so far as relates to the snaps, both kinds.

| | | |
|---|---|---|
| 1879, Oct. | 935 | gross. |
| Nov. | 1,036 | do. |
| Dec. | 920 | do. |
| 1880, Jan'y | 1,119 | do. |
| Feb'y | 910 | do. |
| M'ch | 1,269 | do. |
| Apr. | 601 | do. |
| May | 150 | do. |
| June | 142 | do. |
| July | 520 | do. |
| Aug. | 607 | do. |
| Sept. | 310 | do. |
| Oct. | 565 | do. |
| Nov. | 159 | do. |
| Dec. | 562 | do. |
| 1881, Jan'y | 1,438 | do. |
| Feb'y | 940 | do. |
| M'ch | 707 | do. |
| Ap'l | 726 | do. |
| May | 519 | do. |
| June | 300 | do. |
| July | 845 | do. |
| Aug. | 1,035 | do. |
| Sept. | 831 | do. |
| Oct. | 971 | do. |
| Nov. | 476 | do. |
| Dec. | 564 | do. |
| 1882, Jan'y | 1,044 | do. |

153 118. That account includes both the old and new forms of your Bristol patented snap, does it not?

A. It does.

119. Was it found impracticable to give the number of the new snaps made and sold by you during the period named?

A. I did not understand that the request was limited to either kind.

120. Then you have not prepared any account showing the number of new snaps made and sold by you—is that so?

A. It is.

121. I read to you the request I made to you immediately following your 100th answer (same read to witness.) Did you understand that request?

A. I did.

122. Never have had a copy of it, or had it read to you, since the last hearing?

154 A. No, sir; I took a copy of it at the time, as I supposed. I took an abbreviated copy as a memorandum. I will send my memorandum.

123. Do you recognize the snap I now hand you as the form of snap made and sold by the successor of the Middleton Tool Co. during the period covered by the accounting?

A. I do not; I have never seen this snap before, or one like it, to my recollection.

124. I have no reference in that question to the plate with the mortises in it, but to the body, tongue, and spring more particularly. During the period covered by the accounting did there not appear in the market, as the make of the successor of the Middleton Tool Co., snaps having such a body, tongue, and spring as those contained in the snap I now hand you, with the addition of a single metallic loop for a stud?

A. I do not know. I have never seen a snap, that I know of, made by the successors of the Middleton Tool Co.

(Snap last referred to put in evidence, marked Def'ts' Ex. Middletown Snap.)

155 125. Do you recognize the snap I now hand you as one appearing on the market during the period covered by the accounting as one made by Judd & Blakeslee, of New Britain?

A. I recognize it as one made by Judd & Blakeslee, but it is my impression that it appeared before Oct., 1879.

126. Was it not also on the market during the period covered by the accounting?

A. I cannot say, but I presume it was.

(Snap referred to offered in evidence and same marked Judd & Blakeslee Snap.)

127. Do you recognize the snap I now hand you as one that was on the market during the period covered by the accounting and made by O. B. North & Co.?

A. I recognize it as similar to Andrew's patent snap made by O. B. North & Co.

(Snap last referred to is put in evidence, marked O. B. North & Co.'s Snap No. 2.)

128. Do you recognize the shap I now hand you as such
156 as were made by the defendants during the period covered by the accounting?

A. It is so deformed that I cannot recognize it; it serves no purpose in its present shape.

(Snap last referred to is offered in evidence as Defendants' Exhibit Defendants' Snap.)

129. Did you ever see one of defendants' snaps that did not have a brass rivet for the pivot of the tongue?

A. I can't say.

130. Have you ever seen one of the defendants' snaps that did not have a rivet of some kind for the pivot of the tongue?

A. I am not sure.

131. Do the snaps that W. & E. T. Fitch made under the Bristol patent sued on have any rivets?

A. They have no detachable rivets.

132. Are the figures you gave in ans. to question 109 correct? (Question read.)

A. They are supposed to be.

157 133. What did you state the list or long price of the ⅜ was?

A. $10 per gross.

134. What would be the net of that at 50, 10, & 10?

A. $4.05.

135. What would be the net of that at 60 off?

A. The direct discount would make it $4.00.

136. In your last two answers you evidently state that the difference between a discount of 50, 10, 10 upon $10 and a discount of 60 upon $10 is 5c. In your 109th ans. I understand you to state the same difference as being 18c.; what do you wish to be understood as to that?

(Question objected to, as it assumes that the witness has testified in reference to the rate of discount which is stated in the question to be 50, 10, 10, whereas complainants' counsel does not understand that he has made any statement as to the result of such a rate of discount. The rates that he has testified to have been on the

158 one side before Dec., 1880, 50 and 10, and after Dec. 1, 1880, a discount of 70 per cent.)

A. I will explain it in very few words. My understanding of the question at the hearing on the 14th was the actual net difference between our prices prior to Oct., 1879, and after December, 1880. The item of freight and 2 per cent. contingent discount which applied to the last period, but not to the first, making, I believe, the net difference, as stated.

137. Why did the item of freight and 2 per cent. contingent discount apply to the last period, but not to the first?

A. Because it is a later custom.

138. In your answer to the 109- question, which requests you to state the difference between 50, 10, 10, and 60, no item of freight or 2 per cent. contingent discount was mentioned, was there?

(Question objected to again, as it assumes a rate of discount which is not mentioned or suggested in 109. Question 109 requested the witness to state the difference between a discount of 50 and 10 and a discount of 60.)

159 A. I said in my previous answer, as I understood it, the object was to get the net difference between our sales prior to Oct., 1879, and after Dec., 1880.

139. Will you now read question 109 and answer it carefully, and say whether it asks you any such thing as you stated in your last answer? Ques. 109. "Will you state the difference between those prices and the discount of 60 per cent?"

A. It does not.

140. With the understanding you now have of question 109 and its answer, will you now state whether the answer to 109 is correct?

A. Confined to the rates of discount only the answer is not correct.

141. Will you please answer the following question, or rather will you make a new and correct answer to ques. 109?

A. "Those prices," as I understand it, apply to a period prior to

Oct., 1879, and after December, 1880. The actual difference is 5c. per gross on $\frac{7}{8}$ and inch; on $1\frac{1}{4}$ inch, 7 cents.

160 142. Defendants' counsel repeats request made to this witness immediately after his answer to 100th question.

Redirect 143. Will you please look at the paper now shown you, which purports to give a statement of the items of the net price of $\frac{7}{8}$ and inch and the $1\frac{1}{4}$ inch and the $1\frac{1}{2}$ inch and the $1\frac{3}{4}$ inch before the reduction Dec., 1880, as compared with the net price of the same sizes respectively after the reduction, and state whether those figures are in your handwriting.

A. They are.

144. Will you say whether they are, in your belief, correct, as taken from your books?

A. I believe they are correct.

(Paper put in evidence by complainants' counsel, and marked Complainants' Exhibit Net Prices.)

Recross. 145. What portion of the profit realized by W. & E. T. Fitch on snaps made and sold by them under the Bristol patent during the period covered by the accounting is a manufact-

161 urer's profit—that is, a profit not due to the presence of a patented invention in such snaps?

A. I can't answer.

A. N. Bragg:

1. Will you state what snaps, if any, with swinging tong-es — offered on the market during the period covered by the accounting?

A. All those that have been exhibited in court, besides a number of others that have not been produced here.

2. Will you give the names of such of them as are present, stating the manufacturer and place of manufacture?

A. I identify the snap marked "Mosher snap" as an article made and sold by Geo. D. Mosher, Birmingham, Conn.

Judd & Blakeslee snap, known to the trade as Keoupshall & Nash patent, manufactured and sold by Judd & Blakeslee, New Britain, Conn.

162 Snap marked Middletown snap, manufactured and sold by the Middletown Tool Co. and their successor, Middletown, Conn.

That marked "Anchor snap," manufactured and sold by the Anchor Snap Co., Northfie-d, Conn.

Snap marked O. B. North & Co.'s Snap No. 2, manufactured and sold by O. B. North & Co., New Haven.

Snap marked Defendants' snap, manufactured and sold by A. N. Bragg & Co., Pine Meadow, Conn.

Snap marked O. B. North & Co.'s snap, manufactured and sold by O. B. North & Co., New Haven.

Snap marked Defendants' Exhibit New Snap, manufactured by W. & E. T. Fitch, New Haven.

3. Did snaps the same as "Complainants' Exhibit Old Snap," used at the trial of this case on the merits, appear on the market

during the period covered by the accounting, and if they did, by whom, and where were they made and sold?

A. Such snaps appeared, and they were made and sold by Judd & Blakeslee, New Britain, Conn.

4. Were they on the market in large or small quantities during that time?

163 A. Could not give any definite knowledge as to the actual quantity, but have no hesitation in saying the supply was equal to the demand.

5. Has or not the O. B. North & Co. snap a tongue constructed with a recess in the side opening outward, combined with a coiled spring that rests in such recess and operates between the body of the hook and the tongue?

A. It has.

6. Has it or not also a trigger for operating the tongue such as described in C. B. Bristol's patent, May 16, 1865?

A. It has.

7. Does the trade or do consumers or users of snaps make any inquiry or distinction as to the manner of hanging the tongue in those snaps having a swinging tongue?

(Objected to.)

A. They do not, except that they do not consider a snap with a detachable rivet as similar to one that has not.

164 8. Have defendants ever made any snaps with swinging tongues that did not have a detachable rivet?

A. We have.

9. During the period covered by the accounting have defendants made any snaps with a side recess in the tongue opening outward which did not have detachable rivets?

A. We have.

10. Will you state how defendants have made their snaps in this regard during the period covered by the accounting, confining the answer to snaps with a swinging tongue having a side recess opening outward.

A. I could hardly state from recollection, as the number manufactured in that way were made merely as an experiment, and the number was a comparatively a small one, and I have forgotten all about them, and will say further that, in my opinion, they could not be included under the first claim of Bristol's patent, but that I have included them in my list of sales.

165 11. Do you mean to be understood that the great bulk of infringing snaps made by defendant- had a detachable rivet?

A. Yes, sir.

12. Was that a brass rivet?

A. Either brass or iron; mostly brass.

13. Are snaps with a detachable rivet readily distinguishable from those that have no such element?

A. They are.

14. Of the three thousand and odd gross of snaps specified in Defendants' Exhibit List of Sales, can you state a number and quan-

tity which shall cover all infringing snaps defendants ever made without detachable rivets?

A. I can; twenty-five gross would more than cover it.

15. Can you and will you state whether the different kinds
166 of snaps, with swinging tongues, were sold in the market during the period covered by the accounting in one general competition, or whether there was any special competition between complainants' snap and yours?

A. We understood and so now understand that all the snaps were in the same competition, and have never understood that the competition between us and the so-called Bristol snap was any more marked than the other numerous styles that have been produced here.

Cross-examined:

16. You say you have no knowledge of the competition between your snaps and the snaps manufactured by the complainants being any more marked than that between your snaps and other snaps in the market. Have you any knowledge of the public, and especially dealers in snaps, being warned by W. & E. T. Fitch against the competition of your snaps as infringements on their rights?

(Objected to as immaterial.)

A. I have seen a circular purporting to be signed by W. & E. T. Fitch.

167 17. Have you ever seen more than one such circular?

(Same objection.)

A. I have seen but one.

18. Did you reply to it?

(Same objection.)

A. I cannot now state whether we replied to that one circular or not.

19. Complainants' counsel puts two circulars in evidence, one dated Dec. 17, 1879, and marked Complainants' Exhibit Dec. Circular; one dated Nov. 11, 1880, marked Complainants' Exhibit Nov. Circular.

(Same objection.)

20. Please look at the two circulars just put in evidence and say which of them you recognize as being the one referred to in your answer to the 17th question.

(Same objection.)

A. The one marked Dec. 17, 1879.

21. Is that the circular to which you replied?

(Same objection.)

168 A. It is to the best of my recollection; that is, by that I mean a reply to the trade.

22. You mean a circular issued to the trade, do you not?

A. I do.

23. Can you, and will you, produce one of those circulars?

(Same objection.)

A. I can, and produce it.

(Introduction objected to as immaterial.)

Circular put in evidence by complainants' counsel, marked "Complainants' Exhibit Def'ts' Circular No. 1."

24. Is Exhibit Defendants' Circular, to which I now ask your attention, the only circular which you have issued to the trade on the same subject?

(Same objection.)

A. No, sir.

25. How many other circulars in reference to that subject did you issue?

A. One only, I think.

169 26. Was that one before or after the one now in evidence?

(Same objection.)

A. After.

27. What was its date?

(Same objection.)

A. Aug. 25, 1881.

28. Was there no circular except the one now in evidence issued by you to the trade in relation to this matter before Aug. 25, 1881?

A. I think not; still I would not say positively there was. I certainly do not recollect any now.

29. Will you produce a circular bearing date August 25th, 1881?

(Same objection.)

A. I will do so.

Circular produced and marked "Complainants' Exhibit Defendants' Circular No. 2."

(Objected to as immaterial.)

170 30. Does the Defendants' Exhibit, marked "List of Sales," purport to show the dates of the sales made to your respective customers, and the number of gross or fractions of a gross sold at the respective dates to each?

A. It does.

31. Does it, so far as you know and believe, truly show the dates and amounts of each purchaser of snap hooks with swinging tongues made during the time that we have termed the "period of accounting"?

A. It does.

32. What is the last date of sale of such hooks as appears by the said exhibit and the number of gross sold to Porter Brothers & Harkworth?

A. January 19, 1881, six gross.

33. What upon your books appears to have been the date of your next sale of snap hooks with swinging tongues made to that firm?

A. Sept. 20, 1881.

34. What number of gross were then sold, as appears by your book?

171 A. I cannot say at present. I can guess pretty near it; about 50, I should say.

35. What are the entries of figures from which you make your guess?

A. It appears from our day-book that we sold them goods which amounted to 194.40 dollars, and on that I base my opinion that there was about 50 gross, provided they were all what we call our New York snaps. There may have been others; I know nothing about it.

36. What other sales of snap hooks with swinging tongues appear by your day-book to have been sold at the same date? Please give a list of them and the amount of such sales to each.

A. From the information I now have would not undertake to say.

37. Are those other sales that appear on your day-book to be evidenced in the same way as the sale to Porter Bros. & Harkworth is?

A. I do not understand the question.

172 38. Do you find upon your day-book, under the date of Sept. 20, 1881, on the third entry and on the third line, these figures:

195. Porter Bros. & Hawkworth, 480 ..... 194 40

A. I do.

39. What is the entry on the first line on that date?

(Objected to as outside of the proper period of accounting and not pertaining to the kind of snap hooks in question.)

A. 195, 195, Smith, Seltzer & Co., L. B. 477, 66.42.

40. Now please give the other entries, omitting that of Porter Bros. & Harkworth.

(Same objection.)

A. 2nd. 195. Berad Bros., 478 ..... 105 30
4th. 195. Sheldon Bros., 479 ..... 192 60
5th. 195. Harbison & Gothright, 476 ..... 83 70
6th. 195. To m'f'g account ..... 642 42

41. Do these entries, except the last one, show that sales of snap hooks were made to those parties at that date?

(Same objection.)

A. They show that sales of some kind were made.

42. Do you mean us to understand you do not know whether they were sales of snap hooks or some other article of merchandise?

(Same objection.)

I mean that you should understand that if they were sales of some kind of merchandise they were some kind of snap hooks.

43. What kind of snap hooks were they?

A. Could not say; would prefer to say what they were not.

44. Are you prepared to testify from your own knowledge that none of those hooks sold to those different parties at this date were snap hooks with swinging tongues having a recess in the side of the tongue?

(Same objection.)

A. I am, to the best of my knowledge and belief.

45. I call your attention especially to the snap hooks sold at this time, Sept. 20, 1881, to Porter Bros. & Harkworth, which you estimate as being about 50 gross, and ask you whether you are prepared to say under oath that none of those hooks had a swinging tongue with a recess in its side?

(Same objection.)

A. I know of none that had.

45. Do you know of your own knowledge that all of such
174 hooks were without a recess in the side of the tongue?

(Same objection.)

A. I did not examine each and every snap that was shipped to Porter Bros. & Harkworth at that time, but to the best of my knowledge and belief none of them had a recess in the side of the tongue.

46. But if I understand it, there is no mark by which you can refresh your recollection upon this subject by reference to your books. Is that so?

A. That is correct.

47. Will you please look at your exhibit account of sales and say what is the last day of sale appearing by that exhibit to have been made to J. O. M. Rosenfind, Rock Island, and give the amount of such sale. I believe that date is Dec. 30, 1880.

(Same objection.)

A. Dec. 30, 1880, 66 gross.

48. What upon your books appears to be the next sale made to that firm?

(Same objection.)

A. Nov. 4, 1881, the amount in dollars and cents appears
175 to be $108.

49. Will you please refer me to your day-book for the entry under which this sale appears?

(Same objection.)

A. The day-book from which that entry was taken is not present.

50. Have you any book present which indicates whether or not those hooks sold to I. & M. Rosenfield Nov. 4, 1881, had swinging tongues or not?

(Same objection.)

A. No, sir.

51. Have you any books present which will indicate whether or not they had a recess in the side of the tongue?

A. No, sir.

52. If I understand it this Exhibit Account of Sales purports to show a list of all your customers who have purchased such hooks having a swinging tongue from your firm during the period covered by the accounting. It that right?

(Same objection.)

A. It is to the best of my knowledge and belief.

176 53. Do you know a firm in Rock Island doing business under the name of James McConnell & Sons?

A. I think there is a firm there called James C. McConnell & Sons.

54. Has your firm since it was formed, in May, 1879, had any business dealings with that firm?

A. Yes, sir.

55. What was the earliest date of your business transactions with that firm?

A. January 21, 1879, as appears by our books.

56. I understood your present firm was not formed till May, 1879, and my question related only to transactions of your firm with that house.

A. My answer, then, is incorrect, as it was given with the understanding of my connection with it.

57. Has the firm of A. N. Bragg & Co. ever sold snap hooks to James C. McConnell & Sons, or James McConnell & Sons, whichever may be right?

177 A. We have.

58. Will you give the dates and amounts of such sales?

A. I could not, as their account has been confused with that of S. R. & J. C. McConnell, and there are so many different charges between the two that I am at present unable to distinguish the sales.

59. What is the aggregate number of gross appearing by your books to have been sold to J. C. McConnell & Sons and S. R. & J. C. McConnell?

A. I could not state.

FEBRUARY 23D—9.45.

Examination of A. N. BRAGG:

60. You say you cannot tell the aggregate of the number of gross appearing by your books to have been sold to J. C. McConnell & Son and to S. R. & J. C. McConnell. Do both of these names appear upon your Exhibit Account of Sales?

178 A. They do.

61. Will you please show me where the name of J. C. McConnell & Sons appears?

A. I do.

62. Please read from the exhibit what you now point out as representing sales to J. C. McConnell & Sons?

A. "Nov. 20, 1880, J. C. McConnell, 20, 15, 11¼."

63. Now will you please out where the name of S. R. & J. C. McConnell appears, and in the same manner read from the exhibit?

A. "February, 1880, S. R. & J. C. McConnell, 5¾, 10, 5."

(Counsel for defendants objects to this whole line of inquiry, meaning this analysis of Defendants' Exhibit List of Sales and Account of Sales, as irrelevant to the whole matter in issue, and especially irrelevant on the question of complainants' damages.)

64. Where do the firm of J. C. McConnell or James McConnell & Sons carry on business?

A. I don't remember.

65. Where does the firm of S. R. & J. C. McConnell carry on business?

179 A. I think in Burlington, Iowa. I am not positive on that point. It is there somewhere in the State.

66. Will you show us the entry on your books, Nov. 20, 1880, to J. C. McConnell?

A. "J. C. McConnell & Sons, $203."

67. Is that all that appears in reference to that sale in the book you have before you?

A. It is.

68. I notice on your exhibit, Account of Sales, under that date of Nov. 20, that J. C. McConnell bought under that date 46 gross of snaps. Where did you get your information enabling you to make such a statement?

A. I got it from our books and the person who shipped the goods, and from the order that was sent for the goods, as near as I can recollect.

69. Will you please produce those books and that order?

A. I am unable to do so at present.

180 70. Where are they?

A. In my office.

71. Did you receive notice from your counsel that you were requested to produce on the hearing before the master all your books and papers which would be necessary for you to use in verifying your Exhibit Account of Sales?

A. Do not remember that I did.

72. You brought some books with you to-day, did you not?

A. I brought what I considered necessary.

73. Necessary for what purpose?

A. For any purpose that the counsel should elect to use them for.

74. Is it in evidence that this Exhibit Account of Sales contained 197 distinct sales, and it appears by the exhibit that against each of them there is entered figures showing the amount sold and the different sizes? Have you any books here which will enable

181 you to verify the corrections of that exhibit as to any one of those 197 sales?

A. I have.

75. Please produce it?

A. My day-book will show the corrections in nine-tenths of all the sales that were sent to each of the firms, but in some few instances the young lady who made the entries in this book did not enter the number of gross of each size, and in those cases I presume—I know that she used her memory to a great extent and all other sources of information that came to *my* knowledge.

76. Do you mean that the person who made out Exhibit Account of Sales used her memory as you have stated?

A. When it was necessary, yes.

77. Will you please produce that day-book?

A. It is here in my hand.

182 78. Is it the book to which you have already referred as showing the sales to J. C. McConnell of Nov. 20, 1880?

A. It is.

79. The Exhibit Account of Sales shows, does it not, that on that date there was sold to that purchaser 20 gross of the size of $\frac{5}{8}$, 15 gross of the size of 1 inch, and $11\frac{1}{4}$ gross of the size of $1\frac{1}{2}$ inches?

A. It does.

80. At what date does the day-book to which you have referred go back; what is the date of the first entry in it?

A. Sept. 1, 1880.

81. The account of sales begins Oct. 20, 1879. Have you the day-book which shows the sales made between that date and Sept., 1880?

A. I have.

82. Will you please produce it?

A. I do.

183 83. Will you please refer on your day-book to a sale made to Barnes and Deguan Oct. 23, 1880, and say whether you find anything on the book which show- the number and size of the hooks then sold?

A. I do not.

84. How many other sales of hooks were made under the same date, and to whom?

A. There are other charges, made under the same date, to George K. Shan & Co., Gordon, Kurtz & Co., George D. Keime & Co., Standdout Bros., Howell, Gano & Co., P. I. Schuitz, J. F. Richards & Co.

85. Will you please point out in your Exhibit Account of Sales where any sales appear to have been made by your firm under date of Oct. 23, 1880?

A. I find Standdart & Bros. as one; Gordon, Kurtz is, perhaps, two; that is all I find under that date.

86. Won't you please quote from that exhibit the figures that enable you to say you find those two sales under that date?

A. I find in our exhibit, under date of Oct., 1880, the
184 name Standdart Bros.; also that of Gordon, Kurtz, which appears twice.

87. What are the dates given in your exhibit of sales purporting to have been made in October, 1880?

A. There appears to be no date, except Oct., 1880.

88. Won't you please look at the exhibit more carefully, and see if you have given a correct answer to that question; or rather I will ask you to read from the exhibit all that appears, showing sales made by your firm during the month of Oct., 1880?

185 89. As I count them there are 22 items of sale appearing on the exhibit to have been made during that month. Is that right?

A. Yes, sir.

90. Will you now please look at your day-book and say in how many of these 22 sales there is any memorandum or statement as to the number of gross sold at each sale or the size of hooks?

A. None, so far as I can see from present inspection.

91. Will you now please look through your sales appearing upon the day-book to have been made in Nov., 1880, and say in how many you find a memorandum showing the number and size of hooks sold during that month?

A. None so far as I can see from present inspection.

92. You say that the account of the two firms of J. C. McConnell & Sons, S. R. & J. C. McConnell contain so many different charges that you are unable to distinguish between the two. How, then, were you enabled in making up your Exhibit Account of Sales to

186 give the number of gross purporting to have been sold to each firm, with the date of such sales, with the quantities and sizes?

A. Myself and clerks used all the information we could gather from any source.

93. Having used all the information you could gather, did you arrive at what you believed to be a correct result?

A. We did.

94. Then it is not true, is it, that the accounts are so confused that you cannot distinguish between the two?

A. We distinguished between them to the best of our abilities.

95. Do you think your ability was equal to the occasion, so that you finally reached a correct result?

A. I have so stated.

96. Do you know a firm in Kansas City, Mo., by the name of Kelsey, Robinson & Co.?

187 A. I do not.

97. I will read a list of several firms, giving their place of business, and ask you to attend to each name as it is called: Askew Bros., Kansas City; John B. Schott, Quincy, Ill.; Warriner & Lyttle, Toledo, O.; D. Fishbeck & Son, Milwaukee; Adams & Johnson, Galesburg, Ill.; Armstrong & Graham, Detroit, Mich.; James W. Meek, Columbus, Ohio; Wm. Brigham & Co., Columbus, Ohio; S. B. Roby, Rochester, N. Y.; F. B. Potter, New York city; W. G. Short, New York city. Had your firm ever had any business transactions with either of those firms or individuals; and, if so, with which?

A. We have had business relations with Askew Bros., John B. Schott, Warriner & Lyttle, F. Fishbeck & Sons, James W. Meek, Wm. Brigham & Co., F. B. Potter, W. G. Short & Co.

98. Do either of those names—and, if so, which—appear upon your Exhibit Account of Sale?

188 A. I find one, certainly, and I desire to look it over and make such additions as are necessary.

106. Do you know a firm in New York city of the name of Graham & Haines?

A. I do.

107. What is their business?

A. Hardware.

108. Has your firm had any business transactions with them?

A. We have.

109. What has been the nature or character of those transactions?

A. They have sold more or less German snaps for us.

110. About when did that business relation begin?

A. I think about March or April, 1881.

189 111. Can you tell more accurately by reference to your books?

A. March 30, 1881.

112. And did it exist during the remainder of the period covered by the accounting?

A. It did.

113. Were the sales made by Graham & Haines for you confined exclusively to German snaps?

A. They sold very little of anything else.

114. What was the character of that "little;" I mean what class of goods was it?

A. Sold a limited number of New York snaps.

115. I suppose you can tell, can you not, by reference to your books, what proportion of the hooks you consigned to them to be sold on commission was of the character of German hooks and what the proportion was of New York snaps?

190 A. I have no knowledge at present of the number of German they sold, but the number of New York was contained in the last entry, Exhibit Account of Sales.

116. Will you show me the entries on your books that represent the last item on Exhibit Account of Sales?

A. I believe there are no entries except the one referred to present, or anywhere else on our books.

117. Do you mean us to understand that this last item on the exhibit, which reads "Petty sales: G. & H.; ½ gross ⅞, 9¼ gross 1 inch, 5 gross 1¼ in., 12 gross 1½ inch," does not appear on your books of account?

A. I do.

118. Were those items, then, put down from memory?

A. They were not.

119. From what source were they taken?

A. From what is called an account of sales rendered us by Mess. Graham & Haines.

191 120. Have you got that account here?

A. No, sir.

121. Where is it?

A. Cannot say whether it is in our office or New York; it is one place or the other.

122. When did you last see it?

A. The last time I remember was when we made up Exhibit Account of Sales.

123. Where was that exhibit made up?

A. At our office in Pine Meadow.

124. Have you any reason to doubt that the Graham & Haines account of sales is still there?

A. Would not say positively where it was, as there was certain corrections to be made in the number of German snaps sold, and I suppose it has been back and forth from New York a number of times since then.

192 125. To what date do you refer in your last answer?

A. The various dates on which the accounting was made up.

126. Do you mean the accounting marked Defendants' Exhibit Account of Sales?

A. I do.

127. When was that exhibit finished; I don't mean the day of the month, but was it not within three months of this time, to-day?

A. It was.

128. How often do Graham & Haines send you an account of sales made by them on commission?

A. They have no special date; they send when they get ready.

129. I don't ask for the dates on which they send them, but if they send you every month, or every three months or six months, I wish you would tell us, if you can, and give us the average interval as near as you can.

193 A. I think they mean to send it about once a month.

130. Then do you think that the account of sales sent you by Graham & Haines, from which you took the item of the last entry, was one that had been rendered to you by them during the last three months?

A. I know that it was.

131. What period of sales purported to be covered by this account from which these items were taken?

A. The whole period embraced in the time of our business transactions with them up to the time of making up the account.

132. Do you mean to say that every monthly account rendered you by Graham & Haines contains all your business transactions with them up to the date when it is rendered?

A. I do not.

133. Will you then please explain your answer to the 131st question?

194 A. In the 131st question and questions prior to that relating to the subject and the question since then, excepting the one I am now answering, you limited your inquiry especially to New York snaps. In your 132 question you embrace all the business we have had with Graham & Haines, and that I do not answer in my 131st answer or include in my Exhibit Account of Sales.

134. The last item of which we are talking is Petty sales, 26 gross. You say there were sold by Graham & Haines on commission. Give us a date prior to which they were sold.

A. February 14, 1882.

135. Is that the nearest date you can give approaching the terminal limit inquired after?

A. Yes; that is only a week ago.

136. Will you look at Defendants' Exhibit "Defendants' Snap," put in evidence by you day before yesterday, and say if you so put that exhibit in evidence intending the master to understand that it is a fair representation of the infringing snaps made and sold

195 by your firm during the period covered by the accounting?

A. It is as fair and good an exhibit of the size it represents as any I know of.

137. Look at the snap now shown you and say if you recognize it.

A. I do, and express my thanks for its appearances. Our supply is limited, and I was unable to find one of that size.

138. I infer you do not object to this being put in evidence and marked "Complainants' Exhibit Defendants' Manufacture." Am I right?

A. I see no reason for objection.

Recess.

139. Is or not Def'ts' Exhibit Def'ts' Snap the same in construction and appearance as the other infringing snaps of that size that have been made and sold by defendants?

A. It is the same.

Examination of Mr. Bragg closed.

196 Mr. FITCH recalled:

1. I call your attention to the exhibit put in evidence by the defendants, and said to have been made and sold by Judd & Blakeslee, the successor of the Middletown Tool Co.; by O. B. North & Co. (there being two exhibits of hooks made by O. B. North & Co.), and I ask you to state (to the extent that these hooks competed with your patented hooks) for how many years prior to Oct., 1879, such competition had existed.

A. The competition of Judd & Blakeslee since 1865. That of the Middletown Tool Co. from the same date. Of O. B. North & Co. for twelve years; O. B. North & Co. No. 2, I think, about ten years.

2. What reason that you know is there why the competition of the snap hooks made by Judd & Blakeslee, by the Middletown Tool Co. and its successor, and by O. B. North & Co., respectively, should affect the sale of the Bristol patented hooks and its prices after October, 1879, more than such competition affected their sales and prices before Oct., 1879?

A. I know no reason why it should.

197 3. To what extent did the anchor snap compete with your patented hooks during the period covered by the accounting?

A. To a very limited extent.

4. Can you give us any idea as to how narrow those limits were?

A. It was hardly appreciable.

5. What do you say as to the Mosher Birmingham snap as a competition in the market with you during this period?

A. I do not recognize it.

6. To what extent was the competition of the snaps mentioned in the three or four last preceding questions a moving or operative cause in the reduction of prices made by you in Dec., 1880?

(Objected to as being a mere matter of opinion.)

A. It had no influence whatever.

7. Did you ever send to the trade any circular having
198 reference to the competition of those snaps about which I have just been inquiring, or either of them?

(Objected to as evidence and not rebuttal.)

A. I have not.

8. Will you please look at the thing now shown you, and which you held in your hand, and say what it is?

(Objected to as irrelevant and not rebuttal.)

A. It is a harness ring.

9. Is it a ring sold in the market to be used in connection with snap hooks?

(Same objection.)

A. It is applied to the breeching of a harness.

10. For what size hooks is such a ring adapted?

A. It is adapted to all sizes excepting only $\frac{1}{2}$ inch.

11. Ring put in evidence and marked "Complainants' Exhibit Harness Ring."

(Objected to; same reasons.)

12. Please look at the snap hook now shown you, and say whether it correctly represents one of the patented snap
199 hooks made by W. & E. T. Fitch, and say what its size is.

(Same objection.)

A. It does. Its size is $\frac{3}{8}$.

(Hook put in evidence marked "Complainants' Exhibit Complainants' Snap.")

Cross-examined:

13. Do you say that Defendants' Exhibit Judd & Blakeslee Snap, Mosher snap, and Anchor snap were in the market to any considerable extent prior to Oct., 1879?

A. I do not say that this Exhibit Judd & Blakeslee Snap, but one similar to it, was in the market. The Mosher snap I do not recognize as a competitor at all; know nothing of it. All the competition from the Anchor snap that we know of was prior to 1879.

14. Is it not a fact, as you understand, that Def'ts' Exhibit Judd & Blakeslee Snap is made under a patent of Kempshall & Nash

issued in the last few years, and that the Judd & Blakeslee snap was first put on the market in the last few years?

200 A. I do not know.

15. Do you not understand that snaps like Def'ts' Exhibit Judd & Blakeslee Snap first appeared on the market in the last few years?

A. I think it has been on the market several years.

16. Did you ever see such a one prior to the year 1878?

A. I do not know.

17. Did you ever see such a one on the market prior to the year 1879?

A. I do not know.

18. Is it not a fact, as you understand it, that the Anchor snap is made under the patent of Chas. W. Blakeslee, issued in a few years last past?

A. I do not know who the patentee is.

201 19. Have you or your firm received copies of patents on snap hooks as they have issued from the Patent Office, or soon after?

A. I think we have some; can't designate them.

20. Was not the Kempshall & Nash patent, or the patent used by the Anchor Snap Hook Co., or the patent used by the Birmingham Snap concern among such patents as you received?

A. It may be, but I do not recollect it.

21. Do you not understand that the Mosher or Birmingham snap was made under the patent by Geo. D. Mosher issued in the last few years?

A. I know of no snap by either designation.

22. Did you ever see the Mosher snap on the market prior to Oct., 1879?

A. I have never seen it at all on the market.

23. How early did you see the Anchor snap on the market?

202 A. It is my impression it was late in 1878. It is my impression it was late in 1876.

24. Have you any actual knowledge how many snap hooks like Def'ts' Exhibit Judd & Blakeslee Snap, or how many snap hooks like the Mosher snap, or how many snap hooks like the Anchor snap were made and sold in the market between Oct. 1st, 1879, and Sept. 20, 1881?

A. I have not.

(Def'ts' counsel gives notice that Def'ts' Exhibit Judd & Blakeslee Snap is made under the patent of Kempshall & Nash, date and number of which is not at hand, an authorized copy of which will be produced and made use of upon the hearing of this case; also that the Mosher snap is made under a like patent of George D. Mosher, date and number not at hand, and authorized copy of which will be produced and made use of upon the hearing of this case; also that the Anchor snap is made under a recent patent of Chas. W. Blakeslee, date and number not at hand, an authorized copy of which will be produced and used on the hearing of the case.)

203 Redirect:

25. In answer to question No. 23, you stated your impression, first, to be that you saw the Anchor snap in the market in 1878, and you afterwards corrected it by putting the date in 1876. If there are any reasons that enable you to fix on the latter date, will you please state them.

A. There are reasons, and they grow out of correspondence with the Anchor Snap Co. in Feb'y, 1877, with reference to this snap, I suppose it to be, so that I suppose this snap to have been on the market late in 1876.

26. What was the result of this correspondence, so far as it resulted in the snap remaining on the market after that time, as you understood it?

A. I understood the snap was withdrawn from the market.

Recross:

27. Have W. & E. T. Fitch inquired of, or caused inquiries to be made of, the parties whose names appear on Def'ts' Exhibit List of Sales as to snaps bought by such parties of A. N. Bragg & Co.?

204 A. I presume that such questions may have been asked.

28. You are satisfied there have been, are you not?

A. Yes, sir.

29. Will you give me the information called for by me the other day?

A. I produce a paper containing information desired. Put in and marked Def'ts' Exhibit "Sales of New Snaps."

Redirect:

30. You stated the other day that Defendants' Exhibit Account of Sales showed purchases made by 90 different firms. With how many of those firms have you had, or caused to have, any inquiries as to its correctness?

A. I cannot approximate, for the reason that inquiries were made by our salesmen.

31. Did the result of those inquiries, as communicated to you by your salesmen, tend to show that the account was right or

205 wrong, both as to the quantity sold and the period covered by the sales?

(Objected to as hearsay.)

A. Tended to show it was wrong.

JOHN E. EARLE:

1. Are you familiar with the Bristol patent of May 16, 1865?

A. I am.

2. Can you give any reason why the tongue of the snap hook in that device gives any more marketable value to the snap "as a finished article" than the hook body does?

(Objected to, that the answer would mainly be a mere expression of opinion, as the witness is not shown to know anything of the

marketable value of such hooks; moreover, he has already testified fully as to all matters relating to this tongue that came within his proper province; and further, that the evidence sought by the question is not rebuttal, and proper only at the opening of this case, on this point.)

206 (Counsel for complainants replies to the objection by calling the attention of defendants' counsel, that it is a mere repetition of the question put by him in his cross-examination of Mr. Fitch.)

A. The construction of the body of the hook, which is the subject of the second claim of the patent, relates only to the method of putting the parts together. So soon as the parts are together, the body of the hook has no peculiar advantages to add to its marketable value over any former hooks, that is to say, such as employed a wire rivet introduced through the body of the hook, upon which the tongue would turn. The peculiar construction of the tongue does possess advantages over any previous tongue, adding to the value of the hook as a merchantable article. The recess formed in the side of the hook offers firmer and better places for the spring than the previous construction of the tongue.

3. Please look at the exhibit marked New Snap, and say to what extent its construction of tongue differs from that shown in the Bristol patent of May 16, 1865.

A. It differs only in method of forming the bearing points.

207 It embodies entirely the invention recited in the first claim of that patent, and in the application for the patent was considered as embodying that invention and as an improvement thereon. This, I believe, appears in the record, in the application, if not in the patent itself.

4. What is the advantage due to the improvement mentioned in the 2d claim of the Bristol patent, May 16, 1865?

A. It avoids drilling the body of the hook for the introduction of the pivot and the preparation of the wire for the rivet.

5. What is the advantage due to the improvement as described in the patent under which the new snap is constructed?

A. So far as the body of the hook is concerned, it is the same; so far as the tongue is concerned, it is substantially the same. The advantages in this hook are due principally to the facility with which the hook can be constructed as a whole. The invention relates only to the bearing for the tongue. It is no better as a hook than the original 1865 patent.

208 6. Look at Def'ts' Exhibit Def'ts' Snap, and say whether it is an article in proper condition for use as a merchantable snap.

A. No, sir; it is not.

Notice to produce hooks, &c., filed.

Def'ts' counsel objects to the whole of Mr. Earle's testimony as inadmissible, it having no possible reference to the question of complainants' damages, the question of defendants' profits having been closed by the act of complainants' counsel.

FEBRUARY 28, 1882.

Cross-examination JOHN E. EARLE:

7. How long have you been solicitor of patents?

A. Thirty years.

8. In all of that time have you ever been employed in the manufacture and sale of snap hooks?

209 A. No, sir.

9. How many users of the Bristol snap did you ever hear say that they bought such snap or preferred it because of its peculiar tongue?

A. Don't know that any person ever bought a Bristol snap besides myself of my own knowledge.

10. Then you never heard any person say so?

A. No, sir.

11. What do you mean by the merchantable value of a snap?

A. I mean the value which it has to me in the snap, as I purchased it myself in preference to all others.

12. Have you used all others?

A. There are very few snaps that I have not seen and examined, and a large number that I have used experimentally.

210 13. Then when you use the phrase "merchantable value," or answer that phrase, you refer to such part of the market demand as has been created by your use. Is that so?

A. I refer to my opinion formed from my own use, and to what I have heard others say in regard to the snap.

(Objected to so much of answer as is hearsay.)

14. The spring of the Bristol snap is the same in construction and operation substantially as the spring of Complainants' "Old Snap"?

A. Substantially.

15. In both snaps mentioned in my last question one end of the spring bears against the tongue and the other against the body of the snap, does it not?

A. Yes, sir.

16. In both of these the spring is arranged substantially at right angles to the pivot pin, is it not?

211 A. Yes, sir.

17. Taking a snap of both these kinds, and having in each springs of the same material and same strength, the tongues will be pressed upon by the spring with equal force in both cases, would they not?

A. Generally speaking, no, sir, as the hooks are usually constructed, for the reason that there is not the same freedom of the spring in the old snap as in the Bristol; owing to the peculiar shape of the recess in the old snap, there is more friction upon the spring in the old snap than upon the spring in the Bristol snap.

18. Did you ever make any actual competitive trial of the two snaps I have referred to upon this point?

A. I did some years ago.

19. Did you take two springs of equal strength upon that trial?

212 A. I took snaps of the same size and springs of the same number of wire as were found in the market. In several cases the tongue in the old snap would catch and not return until started.

20. Did you test the springs separately to see if they were of the same strength?

A. Only as to size of wire and judgment only as to strength.

21. Two pieces of wire of the same diameter may differ considerably as to resiliency and elasticity, may they not?

A. Drawn spring wire does not differ in so small a spring to any great extent.

22. Have you ever been in the actual manufacture of drawn spring wire, or in the actual manufacture of goods using drawn spring wire?

A. Not as a manufacturer, but I have had considerable experience in spring wire and examining it upon its merits.

213 23. An object of the construction referred to in the Bristol patent and recited in the second claim is to allow the snap to be made without a separate rivet or pivot pin, is it not?

A. I have said so; yes.

24. And that results in an economy of manufacture, does it not?

A. Yes, sir.

25. And the tongue *g*, with a side recess, is one factor in permitting such a snap to be assembled, is it not?

A. It undoubtedly facilitates assembly over the recess in the old snap.

26. The tongue *g* is in the combination covered in the 2d claim of the patent, is it not?

A. I do not think it is, if by the question you mean to include the recess in the tongue *g*, but a tongue, broadly stated, is an element of that claim. My reason for this opinion is that in describing the body of the hook the specification refers to the tongue *g*

214 broadly and without description of the recess; that is to say, any tongue may be introduced into the recess, and the projection or pin end serve as a support for the spring, and as a fulcrum or joint pin on which the tongue vibrates, so that if a tongue like that in Exhibit Old Snap was introduced into the body of the Bristol snap it would be the invention recited in the second claim.

27. In your second answer you say: "So soon as the parts are together the body of the hook has no peculiar advantages to add to its merchantable value over any former hooks." Complainants' hook body in the assembled article performs the same functions substantially as the body in prior snaps, does it not?

A. It does, as I understand the question.

28. And has substantially the same merchantable value, has it not, so far as you know?

A. I think it has.

FEBRUARY 28.

Counsel for complainants so far modifies his agreement in
215 writing, filed February 24, as to extend only to such of the hooks of the defendants, which he understands are now here in custody of the defendants, as being produced shall appear not to be in daily use.

Testimony closed.

216 And on the 16th day of November, 1882, defendants' exceptions to master's report were filed in the words and figures following, viz:

217 *Defendants' Exceptions to Master's Report.*

United States Circuit Court, District of Connecticut.

W. & E. T. FITCH *v.* A. N. BRAGG & Co.

Defendants except and object to the report dated October 19, 1882, and filed in court November 16, 1882, made by Johnson T. Platt, Esq., master in chancery, to whom this cause was referred by decretal order of this court, filed September 20, 1881; and defendants object to the acceptance and confirmation of said report:

First. For that the master found the number of infringing snap hooks made by defendants to be 3,676½ gross, when he should have found that the same did not exceed 3,000 gross.

Second. For that the master erred in reporting that the complainants have suffered damage by the unlawful acts of the defend-
218 ants through the enforced reduction in the selling price of complainants' patented snaps, owing to defendants' competition by selling the infringing snap hooks, when the master should have found that no such reduction of complainants' prices was caused by defendants' acts.

Third. For that the master erred in reporting that the complainants have suffered damage by the unlawful acts of the defendants through the loss of profits that complainant would have made by the sales of their patented snaps if the infringing snaps of defendants had not been put upon the market, when the master should have found that there was no loss of profits to the complainants upon sales of their patented snaps by the defendants.

Fourth. For that the master erred in not finding as a fact that complainants were introducing to the market a new style or pattern of snap at or about the time their sales of said patented snaps fell off; that there was no positive evidence in the case that the
219 introduction of such new style or pattern of snap was not a factor of more or less weight in decreasing complainants' sales, and that such fact was a factor in decreasing such sales.

Fifth. For that the master erred in not finding that the increase in the price of complainants' patented snaps made by complainants in the latter part of 1879 might have been a factor in decreasing the sales of complainants' patented snaps, and that such increase was a factor in decreasing complainants' sales of their patented snaps.

Sixth. For that the master erred in not reporting that during the period that defendants were selling infringing snap hooks the Anchor snap, the Middleton snap, the Judd and Blakeslee snap, the O. B. North & Co. snaps (Nos. 1 & 2), and Complainants' Exhibit Old Snap were all sold in the markets of the United States in competition with complainants' patented snaps; that the greater part of these snaps thus sold in competition with complainants' patented snaps had a side recess in a swinging tongue containing a torsional spring, and
220 that one of the kinds of snap thus made and sold by O. B. North & Co. had the side recess in a swinging tongue opening outward, with a torsional spring in such recess substantially the same as is patented to complainants; that there is evidence in the case that these snaps thus sold in competition with complainants' patented snaps had effect in decreasing the sales of complainants' patented snap; that there is no positive evidence to the contrary; and that the sale of snaps thus sold in competition with complainants' patented snaps had an effect in decreasing the sales of complainants' patented snaps; that there is no positive evidence to the contrary; and that the sale of snaps thus sold in competition with complainants' patented snaps had an effect in decreasing the sales of complainants' patented snaps. Also that there is no evidence in this case other than that which is matter of opinion; that the sales of infringing snaps by defendants had any effect in decreasing the sales of complainants' patented snaps; also that the decrease in the sales of complainants' patented snaps of which they complained was about twelve per centum of complainants' regular business; that defendants' sales of infringing snaps only amounted to about
221 six per centum of complainants' regular business; and that, therefore, it is evident that defendants' sales of infringing snaps was not the only or the chief factor in decreasing the sales of complainants' patented snaps.

Seventh. For that the master erred in not reporting that the characteristic feature of complainants' patented snap (that is, the opening outward of the side recess in the swinging tongue) was not a matter obvious or readily apparent to the ordinary purchaser, user, or consumer of snaps, and that the presence or absence of such characteristic feature had little or nothing to do with the appreciation of the snap by purchasers, users, or consumers; while defendants' snaps, being all made with rivets at the joint (mostly with brass rivets at the joint), were readily distinguishable from complainants' snaps, which had no such rivets; and that no one was likely to purchase a snap of defendants' manufacture under any impression that he was purchasing a snap of complainants' manufacture.

Eighth. For that the master erred in not reporting that there is no satisfactory evidence in the case that complainants
222 were forced to reduce the price of their snaps, or did reduce the price of their snaps, through the competition caused solely or chiefly by the sales of infringing snaps made and sold by defendants.

Ninth. For that the master erred in not reporting that there is no evidence in the case that the customers for snaps which complainants and defendants had in common were not also, prior to the time that defendants made and sold infringing snaps, the customers of other competitors of complainants aside from defendants; that there is no evidence in the case that the customers complainants and defendants had in common did not, during the period that defendants made and sold infringing snaps, buy snaps from competitors other than defendants; that there is no evidence in the case given by one of the complainants that during the time that defendants made and sold infringing snaps complainants continued to sell the patented snaps to the customers that complainants and defendants had in com-
223 mon; that there is no evidence in the case that, during the time defendants made and sold infringing snaps, complainants did not sell to the customers which complainants and defendants had in common as many or even more of complainants' patented snaps than complainants had sold to such customers prior to the time that defendants made and sold infringing snaps; and that there is no satisfactory evidence in the case that complainants could have sold to the customers which complainants and defendants had in common any of the snaps which defendants sold to such customers in infringement of complainants' patent.

Tenth. For that the master erred in not reporting that there is no evidence in the case tending to show what profits accrued either to complainants or defendants upon the patented snaps made and sold by them respectively, due to the presence therein of the patented improvement, to wit, a swinging tongue having a side recess opening outward, combined with a torsional spring in such
224 recess, as distinguished from the profits which accrued upon the remaining parts of such snaps; nor any evidence in the case tending to show what damages resulted to complainants from defendants' manufacture and sale of infringing snaps containing said patented improvement as distinguished from the damages resulting from defendants' manufacture and sale of the remaining parts of said snaps made and sold by defendants; and that he is unable to make a finding as to either of said questions unless the testimony of Andrew N. Bragg upon such questions be adopted, and that then complainants' damage is $79.12.

Eleventh. For that the master erred in not reporting that both as to defendants' profits and complainants' damages there is no evidence in the case whereon to base a finding, for the reason that there is no evidence as to what "manufacturers' profits" or incidental expenses (such as rent, insurance, clerk hire, superintendence, loss on bad debts, and the like) were upon the whole or any part or parts of the patented snap hooks made and sold by complanants, or upon
225 the infringing articles made and sold by defendants.

December 1, 1882.

W. E. SIMONDS,
*Defendants' Solicitor.*

226 And on the 17th day of April, 1883, opinion overruling exceptions to master's report was filed in the words and figures following, viz:

227 Circuit Court of the United States for the District of Connecticut.

W. & E. T. FITCH *v.* A. N. BRAGG & Co.

SHIPMAN, J.:

The present questions in this case arise upon the defendants' exceptions to the master's report:

He has reported that the defendants made and sold, between October 1st, 1879, and September 20th, 1881, 3,667¼ gross of infringing snap hooks; that there was no testimony from which it could be found that profits accrued to them from the sale, and that the plaintiffs suffered damages by the unlawful acts of the defendants in two ways:

1st. Through the enforced reduction in the selling price of their goods, caused by the competition of the defendants' infringing snap hooks; and

2d. Through the loss of profits which the plaintiffs would have made by the sales of their snaps, if the infringing snaps of the defendants had not been put upon the market.

228 The master finds that the plaintiffs' damage in the first of said ways was the sum of $4,259.07, and that no part of the reduction was due to any of the causes which were named by the defendants, the chief one being the alleged competition of different snap hooks other than those made by them. He further finds that a sufficient operative cause for such damage existed in the competition of the defendants' infringing snap, and that the characteristic feature of the plaintiffs' snap, as a finished article, by which it acquired its position in the market, was the side recess in a swinging tongue, and that this feature appeared in the defendants' snaps, and that they were in direct competition with the plaintiffs' article.

Upon the second element of damage the master finds that the plaintiffs would have sold during the infringing period at least 3,126 gross of their snaps above the quantity actually sold by them if the infringing snaps had not been in the market, but that the testimony as to the cost of manufacture and sale was so meager that he

229 was unable to make any finding as to the extent of the plaintiffs' damage from the loss of profits on sales of which they were deprived by the unlawful acts of the defendants.

The defendants have filed eleven exceptions. The two material classes of exceptions are to the effect that the evidence did not justify a finding that the plaintiffs' reduction in prices was wholly caused by the competition of the infringing snap hooks, and that the master found in favor of the plaintiffs their damage upon the sale of the snaps as a completed article containing both patented and unpatented features, whereas he should have found the part of the dam-

age, if any, which resulted from the decrease in price in the patented part of the snap hook.

Upon the first class of exceptions the defendants say that during the infringing period other hooks than either theirs or the plaintiffs, having a side recess in a swinging tongue, were in the market and helped the competition and helped to decrease the prices.

It is to be noticed that the damages which are found in favor of the plaintiffs result only from an enforced reduction in prices. The plaintiffs have been manufacturing their hook since 1865.

230 Judd and Blakeslee and the Middletown Tool Co., or its successor, have been their competitors in snap hooks since that date, while the snap hooks Nos. 1 and 2 of O. B. North & Co. have competed with their article for twelve and ten years, respectively. No one of these hooks ever affected the plaintiffs' prices. The same is true of the Mosher and Anchor hook, and it may be remarked that there was no evidence of importance upon the part of the defendants tending to show that these other competing snap hooks had an effect in the reduction of prices. The defendants claimed that the O. B. North & Co. hook was both a competitor and a plain infringer, and that therefore it was unjust to visit upon them all the consequences of the infringement. It is immaterial to the issues of this case whether this snap hook is or is not an infringement of the plaintiffs' patent if it has not reduced their prices. If it has not injured the plaintiffs in this regard, its presence in the market does not lighten the burden of the defendants.

The next and important exception relates to the fact that the master made no apportionment of the reduction in price between the patented and the unpatented parts of the snap hook.

231 A harness snap hook of the general class to which the plaintiffs' article belongs is a little device consisting of a hook and a tongue so actuated by a torsional spring that the hook is prevented from disengagement from the ring to which it may be attached. A hook is, of course, a necessary part of the device, but the hook part of the various snap hooks is substantially the same. The difference between the different kinds of harness snap hooks consists substantially in the methods in which the tongue and spring are constructed and arranged with reference to each other, and thus the springing tongue, by which is meant the tongue with the spring, is the distinctive or characteristic part of the device. It is not merely the essential feature of the plaintiffs' hook, but it is the essential feature of all snap hooks of this class. I do not mean by "essential" that it is the only important part of the completed article, but I mean that it is the part in which consists and which makes the difference in the value of different kinds of snap hooks as marketable articles. The essential and characteristic feature of the plaintiffs' and defendants' snap hooks is a swinging tongue with a side recess, and this feature makes the article what it has been in the

232 market.

This statement of the nature of the device shows that the principle which is involved by the defendants, and which is perfectly true when applied to a certain state of facts, is not applicable

to the facts in this case, the principle being that, when the patented thing is a mere improvement in a part of a device, the proof of damages resulting from an infringement must be limited accordingly. The plaintiffs' snap hook is an improvement upon the Judd and other snap hooks, in that it is a new and better way of constructing and arranging the same tongue and the same spring, and therefore the defendants say that the damages must be limited to those which result from the improper use of the plaintiffs' improvement upon the Judd hook. But the Bristlet snap hook is not a mere improvement upon the Judd hook. The Judd device had a tongue and a spring made and arranged in a way of its own; which method makes the article as a marketable article. The plaintiffs' snap hook has its tongue and its spring made and arranged in a certain other way which gives to the device its value as a finished article in the market.

233 But, the defendants further say, that the device is composed of an unpatented hook and a swinging tongue, and that the enforced reduction in price was fully as much upon the hook as upon the tongue, whereas the master gave the entire reduction as damages, when it was the duty of the plaintiffs to prove, and of the master to find, if a sufficient basis was furnished for the finding, how much of the damage was due to the infringement of the patented part.

While it is not true that the tongue is the whole of the device, or that the hook is not an indispensable part of it, yet the tongue is the peculiar and variable and, as has been said, essential feature in all snap hooks of this class, and the hook is the unvarying feature to which the tongue is attached. Both together constitute a snap hook, and the patented tongue must, in connection with an unpatented hook, be placed in the form of a snap hook for sale. This state of facts brings the case within the principle which is stated in Sargent *v.* Yale Lock Manufacturing Co. (17 Blatchf. C. C. R., 244), and which is, that when reduction of prices in the plaintiffs'

234 sales is the only element of damages, if the essential feature of the plaintiffs' structure, and of the infringing structure, respectively, is the patented device, and the patented device, being only a part of the structure, must necessarily be embodied in the complete structure for sale, and he is enabled by the presence of such patented device to make his profit on the entire structure, and he is deprived, by the acts of the defendant, in selling at low prices infringing structures containing the patented device, of the profit which he otherwise would have made on the structures containing the patented device which he actually sold "it seems plain that the defendants' infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices, after allowing a proper sum for any other patented device contained in the defendants'" structures, "and for any other cause which gave to the defendant an advantage in selling his structures."

Each of the various kinds of snap hooks had it share of the trade. The plaintiffs' article had its share of success, and their prices were

not interfered with until the defendants appeared with their
235 snap hook, which contained the plaintiffs' distinctive feature.

In this state of facts the plaintiffs affirmatively claimed that the reduction was owing entirely to the infringement, and also denied that it was attributable in any respect to any of the causes which were suggested by the defendants. It has occurred to me that the reduction might have been owing in part to the commercial success and enterprise of the defendants in pushing their goods upon the market and in effecting sales where the plaintiffs could not; but no exception was taken to the master's report on this ground, and the suggestion was not made before him, and I do not suppose that the principle that the plaintiffs must affirmatively show by satisfactory evidence how much of the damage was attributable to the infringement means that, after he has proved that the infringement was the sufficient operative cause of the entire damage, and has refuted all the suggestions of contributory causes which the defendant made, he must disprove the existence of all the possible causes which might have existed, but which it was not
236 suggested ever did exist. The defendants' exceptions are overruled.

John S. Beach, for the plaintiffs.
Wm. Edgar Simonds, for the defendants.

237 And on the 1st day of May, 1883, the following final decree was made and entered in said cause, viz:

At a stated term of the circuit court of the United States of America for the district of Connecticut, in the second circuit, held at New Haven on the fourth Tuesday of April, 1883.

Present: The honorable Nathaniel Shipman, district judge.

W. & E. T. Fitch
*vs.*
A. N. Bragg & Co. } In Equity.

This cause having come to be heard upon the report of Johnson T. Platt, Esq., master *pro hâc vice*, to whom it was referred, to ascertain and report to the court an account of the gains, profits, and savings and advantages which the said defendants have received or which have arisen or accrued to them from infringing the said exclusive rights of the said complainant under said first claim of said letters patent, as well as of the damages the complainants have sustained thereby, which report bears date the 19th day of October, 1882, and also upon exceptions taken to said report on the
238 part of said defendants, and the said cause having been argued by counsel and due deliberation had thereon:

It is ordered, adjudged, and decreed, and this court doth, by virtue of the power and authority therein vested, *doth* order, adjudge, and decree, that said exceptions of the defendant be, and the same are hereby, overruled, and said report of the said master be, and the same is hereby, accepted, and that the complainants recover of the

said defendants their damages, as stated and assessed in the report of the said master, to wit, the sum of four thousand two hundred and fifty-nine dollars and seven cents, and their costs.

It is further ordered, adjudged, and decreed that the said defendants pay to the said complainants the sum of four thousand two hundred and fifty-nine $\frac{07}{100}$ dollars and their costs in this suit, to be taxed, and that said complainant- have execution therefor, and that the injunction heretofore granted in said cause be continued and made perpetual.

N. SHIPMAN,
*District Judge.*

239 I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, do certify that the foregoing is a true copy of the bill, answer, replication, decree, proceedings, and record on file and of record in my office in the case of W. & E. T. Fitch against A. N. Bragg & Co.

In testimony whereof I have hereunto set my hand and the seal of said court, at Hartford, in said district, this 19th day of June, A. D. 1883.

[Seal of Circuit Court, Connecticut.]

E. E. MARVIN, *Clerk.*

Endorsed on cover: Connecticut C. C. U. S. No. 379. Andrew N. Bragg and Robert R. Smith, copartners under the name of A. N. Bragg & Company, appellants, *vs.* Eleazer T. Fitch and Emily M. Fitch, copartners under the name of W. & E. T. Fitch. Filed 9th October, 1883.

*Defendant's Exhibit [Complainant's] Sales of "New Snaps."*

FITCH'S TESTIMONY, Record, page 62.

Cr.-int. 100. Can you tell how many like Defendant's Exhibit "New Snap" you have made and sold in the period covered by defendant's accounting?

A. I can not at the present hearing.

(Defendant's counsel requests the witness to give at the next or convenient hearing the number of snaps made and sold by W. & E. T. Fitch, like Defendant's Exhibit "New Snap," from October, 1879, up to February 1, 1882, separating the number for each calendar year.)

* * * *

Cr.-int. 117. (Record, page 63.) Can you and will you now give as requested at the last hearing, the number of snaps made and sold by W. & E. T. Fitch like Defendant's Exhibit "New Snap," from October 1, 1879, to February 1, 1882, separating the number for each calendar year?

A. I can and will do so, so far as relates to the snaps; both kinds.

(Witness hands in a list which is printed on page 64 of the record.)

Cr.-int. 118. That account includes both the old and new forms of your Bristol patented snap, does it not?

A. It does.

Cr.-int. 119. Was it found impracticable to give the number of the new snaps made and sold by you during the period named?

A. I did not understand that the request was limited to either kind.

Cr.-int. 120. Then you have not prepared any account showing the number of new snaps made and sold by you—is that so?

A. It is.

Cr.-int. 121. I read to you the request I made to you immediately following your 100th answer: [same read to witness.] Did you understand that request?

A. I did.

Cr.-int. 122. [Have you] never had a copy of it, or had it read to you since the last hearing?

A. No, sir; I took a copy of it at the time, as I supposed. I took an abbreviated copy as a memorandum. I will send my memorandum.

* * * *

Recross.-int. 29. Will you give me the information called for by me the other day?

A. I produce a paper containing information desired.

(Put in and marked "Defendant's Exhibit Sales of New Snaps.")

*Defendant's Exhibit Sales of New Snaps.*

Memd of snaps separating the "old" from the "new."

| 1880 | *Total.* | *Old.* | *New.* |
|---|---|---|---|
| May | 150 | 123 | 27 |
| June | 142 | 142 | 00 |
| July | 520 | 520 | 00 |
| Aug. | 607 | 488 | 119 |
| Sept | 310 | 72 | 238 |
| Oct. | 565 | 116 | 449 |
| Nov. | 159 | 24 | 135 |
| Dec. | 562 | 41 | 521 |
| 1881. | | | 1489 for 1880 |
| January | 1438 | 45 | 1393 |
| Feb. | 940 | 33 | 907 |
| Mar. | 707 | 33 | 674 |
| April | 726 | 25 | 701 |
| May | 519 | 30 | 489 |
| June | 300 | 19 | 281 |
| July | 845 | 34 | 811 |
| Aug. | 1035 | 57 | 978 |
| Sep. | 831 | 45 | 786 |
| Oct. | 971 | 56 | 915 |
| Nov. | 476 | 14 | 462 |
| Dec. | 564 | 15 | 549 |
| 1882. | | | 8646 for 1881 |
| Jan. | 1044 | 45 | 999 for 1882 |

*Defendant's Exhibit List of Sales.*

FROM A. N. BRAGG'S TESTIMONY, (Record, page 41.)

Int. 11. Are you able to state when your firm first began to manufacture snap-hooks having a recess in the side of the tongue?

A. As near as I can recollect and learn from my book, it was about October, 1879.

* * * *

Int. 2. (Record, page 50) When did the defendants entirely cease making and selling snap-hooks of any and all kinds having a side recess in a swinging tongue?

A. Sometime in July or August, 1881; I could not positively state when.

Int. 3. Have you here and will you produce a list of all sales of snap-hooks with swinging tongues that defendants ever made and sold up to the time that defendants entirely ceased selling snap-hooks having a side recess in a swinging tongue?

A. I have, and produce it.

Int. 4. 3667¼ gross is the total shown upon defendant's exhibit List of Sales, is it not?

A. Yes, sir.

Int. 5. Is there any way of telling accurately from your books or otherwise how many of said 3667¼ gross of snaps had a swinging tongue with a side recess.

A. I have given the subject a great deal of attention and can say positively that there is no way of distinguishing the different styles of snaps made, by our books or in any other way.

Int. 6. Can you, and if you can will you name a number or quantity of those snaps which you feel positive will include all that defendants have ever made and sold having a side recess in a swinging tongue?

A. My answer to that question is that we have produced a statement, and am positive now that the number given in that statement of 3,000 gross is substantially correct.

*Defendants' Exhibit List of Sales.*

| 1879 | | | 5/8 | ¾ | 7/8 | 1 | 1¼ | 1½ | 1¾ |
|---|---|---|---|---|---|---|---|---|---|
| Oct. | 20 | Smith, Seltzer & Co. | | | 5 | 5 | | 3 | |
| Nov. | 11 | David Cooper | | | 4 | 4 | | 1 | |
| | | Lockwood, M. F. | | | 10 | 6 | | | |
| | 18 | J. B. Sickles & Co. | | | 9 | 5 | | 5 | |
| | | Lyle & McCance | | | | 2 | | | |
| | | E. Helger & Co. | | | 4 | 4 | | 3 | |
| | | Harbinston & Gathright | | | 4 | 4 | | | |
| | 21 | J. Herdman & Sons | | 1 | 1 | 4 | 1 | 1 | |
| | | Thos. Hare | | 3 | 3 | 2 | 2 | 2 | |
| | 26 | Burns & Degman | | | 5 | 5 | | 5 | |
| | 29 | J. H. Marshall | | 2 | 7 | 5 | | 4 | |
| Dec | 2 | N. W. Hunter | | 2 | 5 | 4 | | 10 | |
| | 4 | Rogers, Engle & Co. | | | 5 | | | | |
| | | Lockwood, Vandee & M. | | | | | | 8 | |
| | | C. Gerber | | | 5 | | | | |
| | 9 | Brentmall, Lamb & Co. | | | | | | 10 | |
| | | J. J. Bantlin | | | 5 | 3½ | | 3 | |
| | | J. W. Morrell | | 3 | 6 | 3 | | | |
| | | McWhinney, Nease & Co. | | | | 5¼ | | 4½ | |
| | 16 | Myre, Bannerman & Co. | | | 10 | 4 | | 8 | |
| | | Markley, Alling & Co. | | | 12 | 5 | | 4 | |
| | 18 | Smith, Seltzer & Co. | | | | 14 | | | |
| | | Black & Owen | | | 9 | | | 3¾ | |
| | 27 | McWhinney, Nease & Co. | | 5 | | | | | 5 |
| | 31 | J. Woodell | | | | 1 | | | |
| | | Geo. Dyer | | | 6 | 6 | | 6 | |
| | | Wolf, Lane & Co. | | | | 5 | | | |
| | | Jacob Strauss & Co. | | | | 5 | | 5 | |
| | | P. Hayden & Co. | | | 10 | | | 1 | |
| 1880 | | Brentmall, Lamb & Co. | | | 10 | | | 4 | |
| Jan. | 20 | J. & M. Rosenfield | | | 5 | 5 | | 5 | |
| | | Myre, Bannerman & Co. | | 5¼ | | 5 | 5 | 2 | |

| 1880 | | | 5/8 | 3/4 | 7/8 | 1 | 1 1/4 | 1 1/2 | 1 3/4 |
|---|---|---|---|---|---|---|---|---|---|
| | | Smith, Seltzer & Co. | | | | 1 1/2 | | | 3 |
| | | Thos. Hare | | 2 | 3 | 3 | | | |
| | | Smith & Miller | | | 4 3/4 | 5 | 5 | 10 | |
| | 21 | Black & Owen | | | | | 3 3/4 | | 6 |
| | | McWhinney, Nease & Co. | | 9 3/4 | | | 5 | | |
| | | Markley, Alling & Co. | | | | | | 8 | |
| | | P. Hayden | | 6 | 6 | | | | 3 |
| | | J. & M. Rosenfield | | 3 | | | | | |
| | | P. Hayden | | 1 1/4 | 1 | | | | |
| Feb. | 14 | John Pritzlaff | | 1/2 | 5 3/4 | 8 | | | 3 |
| | | Davis & Mederry | | | 5 | 10 | | | |
| | | P. J. Peters | | | | 10 | | | |
| | | Standart Bros. | | | 5 | 6 | | 5 | |
| | | Black & Owen | | 1 | 3 | 12 | | 1 3/4 | |
| | | S. R. & J. C. McConnell | | | 5 3/4 | 10 | | 5 | |
| | | Lyle & McCance, | | | 5 | 11 3/4 | | | |
| | 28 | Markley, Alling & Co. | | | 5 | 5 | | 14 | |
| | | Gordon & Kurtz | | | 5 | 5 | | 5 | |
| | | B. S. Green | | | 5 | 5 | | 5 | |
| | | Smith & Schurtz | | | 5 | 5 | | 5 | |
| | | Haight & Sears | | | 5 | 5 | | 5 | |
| Mar. | 17 | Harrison Knight | | | 5 | 5 | | 5 | |
| | | Markley, Alling & Co. | | | | | | 9 | |
| | | P. Wilson & Sons | | | 5 | 5 | | 5 | |
| | | S. R. & J. C. McConnell | | | 5 | 5 | | 5 | |
| | | J. D. Leedberger | | | | | | 3 | 5 1/4 |
| | | Haight & Seers | | | 5 | 5 | | 5 | |
| Apr. | 22 | N. W. Hunter | | | 13 | 10 | | | |
| | | Gordon & Kurtz | 2 | 10 | 9 | | | | |
| | | J. B. Sickles & Co. | | 5 | 1 | 5 | 5 | | |
| | | David Cooper | 3 | 4 | | | 1 | | |
| | | McWhinney, Nease & Co. | | | 15 | | 5 | | 3 |
| | 24 | E. Helger & Co. | | | | | 1 | | |
| May | 24 | Markley, Alling & Co. | | | 24 | | | 11 1/4 | |
| | | Harrison, Knight & Co. | | | 24 | | | 11 1/4 | |
| | | Davis & Meddery | | | 24 | | | 11 1/4 | |
| | | A. S. Shott | | | 12 | | | 5 | |
| | | Smith & Miller | | | 14 | | | | |
| | | Pratt & Co. | | | 4 | 2 | | | 1 |
| | 31 | Haight & Sears | | | | | | 11 1/4 | |
| | | Jacob Strauss & Co. | | | | | | 11 1/4 | |
| | | Lyle & McCance | 10 | | 5 | 10 | | | |
| | | J. & M. Rosenfield | | | | | | | |
| | | J. J. Bantlin | | 3 | 5 | | 1 | | |
| | | J. B. Sickles & Co. | | | | | | 11 1/4 | |
| | | Whittaker, Haines & Co. | | | | | | 11 1/4 | |

| 1881 | | | 5/8 | 3/4 | 7/8 | 1 | 1 1/4 | 1 1/2 | 1 3/4 |
|---|---|---|---|---|---|---|---|---|---|
| | | Simmons Hard. Co. | 5 | 2 | | | | | |
| | 26 | Geo. De B. Kein & Co. | | | | | 5 | | |
| | 30 | Geo. Wandheim | | | | | | 5 | |
| | | Geo. De B. Keim & Co. | | 5 | | | | | |
| | | Lyle & McCance | 5 | | | | | | |
| Apr. | 4 | P. J. Schurtz | | 2 | 8 | 10 | | 11 1/4 | |
| | | L. L. Hull | | | | 4 | | 3 | |
| | | Wm. H. Von Nostrand | | | 10 | 10 | 5 | | |
| | | Westhall, Hines & Co. | | | 18 | | | 11 1/4 | |
| | | H. N. Fredrick | | | 10 | | | 5 | |
| | | C. M. Biddle & Co. | | | 5 | | 2 | 3 | |
| | | Lyle & McCance | 5 | | | | | | |
| | 27 | Charles Friend | | 10 | | 10 | | 11 1/4 | |
| | 30 | Geo. Dyer | | 5 | | 18 | | | |
| | | Morley Bro's | 5 | 5 | 10 | 10 | 2 | 5 | |
| May | 13 | Sheldon Bro's | 2 | | 5 | | | 5 | |
| | 17 | C. R. Perkins | | | | 10 | | 5 | |
| | | Smith & Miller | 5 | 5 | | | | | |
| June | 11 | C. M. Biddle & Co. | | 1 | 1 | 2 | 2 | 2 | |
| | 16 | E. T. Stickney | | | 6 | 6 | | 4 | |
| | 29 | Mayo & Clark | | | 3 | 6 | | 2 | |
| | | W. F. & Co. | | | 4 | | | 2 | |
| July | 16 | Tho's Hare | 3 | | | | | 5 | |
| | 25 | Westhall, Hines & Co. | | | 10 | | | | |
| | 28 | Markley, Alling & Co. | | | | 18 | | | |
| Aug | 12 | B. S. Green | | | 18 | 30 | | 30 | |
| | 20 | G. & J. S. Collins | | 2 | 10 | 10 | 6 | 10 | |
| | | Petty Sales G. & H. | | | 1/2 | 9 1/4 | 5 | 12 | |
| | | | 5/8 | 3/4 | 7/8 | 1 | 1 1/4 | 1 1/2 | 1 3/4 |
| | | | 49 | 165 1/4 | 1,251 3/4 | 1,223 1/4 | 179 | 766 | 32 1/2 |
| | | Total— | | | | 3,667 1/4 | | | |

121-478

U. S. Supreme Court,

October Term, 1886,

No. 122.

- 0 -

A. M. Bragg et al. v. E. T. Fitch et al.

Copies of Patents.

Palmer & Simmons, No. 9252, Sept. 7, 1852,

D. M. Hull, No. 24462, June 21, 1859,

T. S. Abeel, No. 41131, Jan. 5, 1864,

O. S. Judd, No. 45414, Dec. 13, 1864,

T. R. Bristol, No. 47714, May 16, 1865,

121

Office Supreme Court U. S.
FILED
JAN 6 1887
JAMES H. McKENNEY,
CLERK.

# APPELLANTS' BRIEF.

## UPREME COURT OF THE UNITED STATES.

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IDREW N. BRAGG AND ROBERT R. SMITH, COPARTNERS, UNDER THE NAME OF A. N. BRAGG AND COMPANY, APPELLANTS,

*vs.*

EAZER T. FITCH AND EMILY M. FITCH, COPARTNERS, UNDER THE NAME OF W. AND E. T. FITCH.

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PEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

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WM. EDGAR SIMONDS, Appellants' Counsel.

# United States Supreme Court

## IN INTERFERENCE.

A. N. BRAGG & CO.
*vs.*
W. & E. T. FITCH,

## APPELLANTS' BRIEF.

### STATEMENT OF THE CASE.

THIS is a suit in equity. It comes here by appeal from the United States Circuit Court for the District of Connecticut. The complainants in the suit below are W. & E. T. Fitch of New Haven, Conn. The defendants in the court below are A. N. Bragg & Co. of New Hartford, Conn The suit was brought for the alleged infringement of letters-patent for "Harness Hooks," to Charles B. Bristol, No. 47,764, dated May 16, 1865. This patent has two claims; only one is alleged to be infringed; that is the first claim of the patent, and is in words as follows, to wit:

"The combination of the tongue (*g*) with the spiral spring (Fig. 4) 'when the spring works on the torsion principle and rests in a recess '(as *r*) in the rear end of the tongue, all substantially as herein 'described."

The Circuit Court sustained the validity of the patent, found the defendants to be infringers, and mulcted the defendants in *damages* (no profits) to the extent of $4,259.07. These defendants and appel-

lants appeal from each and every part of the finding of the court below, and specify for error:

*First.* The Circuit Court erred in giving the patent validity, as to the claim in issue.

*Second.* The Circuit Court erred in finding the defendants infringers.

*Third.* The Circuit Court erred in awarding complainants substantial damages.

To complete this explanatory matter a copy is appended of the patent in suit.

## SPECIFICATION.

*To all whom it may concern:*

Be it known that I, Charles B. Bristol, of the city and county of New Haven in the state of Connecticut, have invented a new and useful improvement in Harness Hooks, or Snaps.

And I do hereby declare that the following is a full, clear and exact description of the construction, character and operation of the same, reference being had to the accompanying drawings which make part of this specification, in which—

Fig. 1 is a perspective view of the hook, or snap, showing its loop attached to a strap, as ready for use.

Fig. 2 is a perspective view of the hook and loop, part showing its shape when cast.

Fig. 3 is a perspective view of the tongue part, when ready to be put into its place.

Fig. 4 is a perspective view of the spiral spring, showing its form.

I make the hoop and loop part of the snap of malleable cast iron, or any suitable alloy, by casting it substantially in the shape, or form, shown in Fig. 2; that is, the hook, *a*, in its permanent form, and the loop, *b*, nearly in the shape it will be when finished (as shown in Fig. 1), with the two lips, or ears, which form the sides, or walls, of the recess which receives and holds the tongue *g*, Figs. 1 and 3, and the spiral spring (Fig. 4, and which is indicated *h* and *i*, Fig. 1) and the projection or pin *n*, Fig. 2, which serves as a support for the spring, and as a fulcrum or joint pin on which the tongue vibrates.

I make the tongue *g*, Figs. 3 and 1, by casting or making it substantially in the form shown in Fig. 3 with a hole to suit the fulcrum *n*, Fig. 2, and a recess *r* in which the spring, Fig. 4, rests, and works, to close the snap; and with or without a projection, or trigger, as shown at *t*, Figs. 1 and 3, by which the tongue may be depressed to open the snap.

I make the spiral spring of elastic wire, in the usual way, as shown in Fig. 4, with two ends, *h* and *i*, projecting tangentially to serve as stops to cause the spring to operate, or be operated on the envolute and evolute, or torsion principle, when the tongue is moved as indicated at *h* and *i*, Figs. 1 and 4.

Having made the parts as before described, I place the spiral spring, Fig. 4, on the projection, or pin *n*, Fig. 2, and slip the tongue, Fig. 3, onto the projection, or fulcrum pin *n*, so that the spring, Fig. 4, will rest in, and be inclosed by the recess *r*, with the two tangential parts *h* and *i* pointing toward the hook *a*.

I then place the article in a proper vise, or press, and close up the cavity between *c* and *d* until the pin *n* comes in contact with the side or ear *c*, Fig. 2, when the whole will appear as represented in Fig. 1 (except the strap *A*), and will be ready for use or sale.

To use this hook or snap, I bear down the tongue *g* in the usual way to open the hook, which will cause the involute torsion of the spring, and by releasing it the evolute operation of the spring will throw back the tongue to the position shown at *g*, Fig. 1, or when the trigger is used I apply my finger to the projection or trigger *t*, Figs. 1 and 3, and pull it back or toward the loop *b*, by the leverage, will depress the tongue *g*, and the effect will be the same as before.

What I claim as my invention and desire to secure by letters-patent is the combination of the tongue (*g*) with the spiral spring (Fig. 4) when the spring works on the torsion principle, and rests in a recess (as *r*) in the rear end of the tongue, substantially as herein described.

2. I claim the combination of the fulcrum pin (*n*) with the tongue (*g*) when the pin (*n*) is cast in one of the ears, and the recess or cavity is fitted to be closed, substantially as herein described.

CHAS. B. BRISTOL.

Witnesses:

JAS. P. BRISTOL,

R. FITSGERALD.

# PART I.

## VALIDITY AND INFRINGEMENT.

### COMPLAINANTS' FIRST CLAIM VOID BECAUSE ANTICIPATED.

#### A.—CONSTRUING IT BROADLY—AS IT READS.

The claim in question is:

"The combination of the tongue (*g*) with the spiral spring (Fig. '4) when the spring works on the torsion principle and rests in a 'recess (as *r*) in the rear end of the tongue, substantially as herein 'described."

This is a *combination* claim. It has *two* elements only. These are—

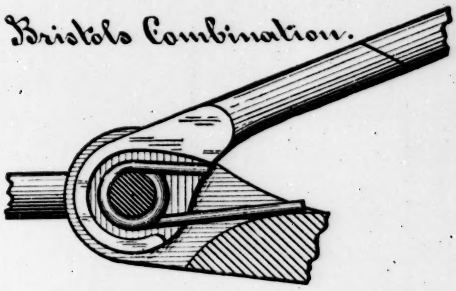
1. The tongue (broadly).
2. The spiral spring—when it—
   *a*. "Works on the torsion principle," and
   *b* "Rests in a recess (as *r*) in the rear end of the tongue."

The body of the hook is not included in the combination. The two elements to be considered are *first*, a tongue; *second*, a torsional spring resting in a recess in the rear end of the tongue. The "recess" is not limited as to form or shape; the specification is "*a* recess," not *the* recess. To make it very clear that recesses of different shapes and forms are within the claim, the patentee introduces "(as *r*)" immediately after "recess" the clear meaning of which is that the recess lettered "*r*" in the drawing is one of a class which will answer the purpose.

Such combination is found in at least three instances prior to Bristol's invention.

BRISTOL'S COMBINATION.

(Harness Hook, Pat. May 16, '65, No. 47,764.)

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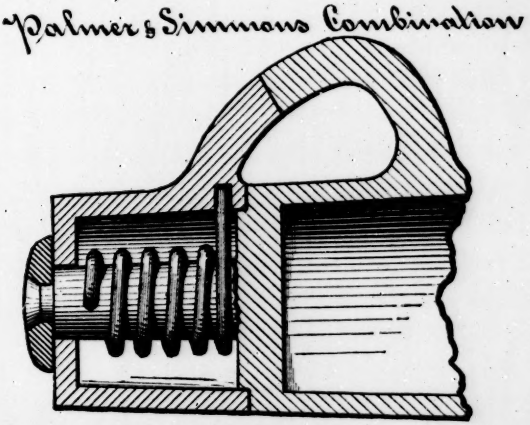
PALMER & SIMMONS' COMBINATION.

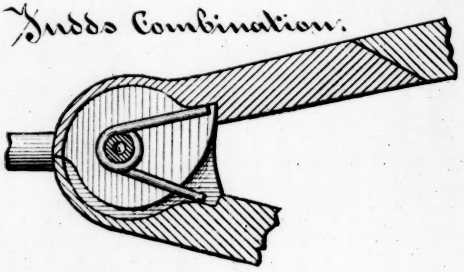
(Whiffletree Hook, Pat. Sept. 7, '52, No. 9,252.)



JUDD'S COMBINATION.

(Harness Hook, Pat. Dec. 13, '64, No. 45,414.)

Judds Combination.



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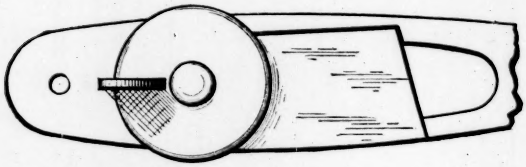
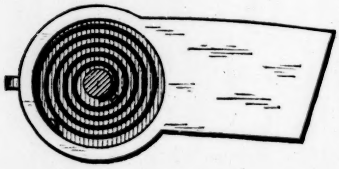
HULL'S COMBINATION.

(Trace Fastener, Pat. June 21, '59, No. 24,462.)

Hulls Combination





*Shepard's testimony, [Deft's Expert] ; page 24, record :*

Ans. 3. * * * I fail to find any limitation either in the specification or in the first claim to the combination referred to therein, except that the spring shall work on the torsion principle and rest in a recess in the rear of the tongue. Any form of swinging hook so mounted as to be capable of oscillation, and having a spiral spring working on the torsion principle and resting in a recess of the spring, in the rear end of the tongue, would, in my opinion, be the thing or invention described in the patent and specifically referred to in the first claim.

Int. 4. On such an understanding of the description and the first claim of the Bristol patent, is or not the combination specified in that claim found in any of the previous patents put in evidence by the defendants or in any of the snap or fastening exhibits put in evidence by the defendants ?

Ans. It is, in the Exhibit Hull Patent, Exhibit Palmer and Simmons Patent, and Exhibit Judd Patent of 1864. I find the same combination of a swinging tongue and spiral spring when the spring works on the torsional principle and rests in a recess at the rear end of the tongue, also in the device called the Exhibit Hull Fastener and in the exhibit called the Palmer and Simmons Hook. In all of these exhibits excepting the Judd patent of 1864, the projecting arms of the spiral spring do not project tangentially, but I do not understand that the tangential projection of the arms to be material to the first claim, of the Bristol patent. Said tangential arms are, however, clearly shown in the Judd patent of 1864 The Judd patent of 1863 shows a swinging tongue with a U shaped spring, one arm of which rests in a recess in the rear end of the tongue and as a combination of spring and recessed tongue it is substantially the same as that referred to in the first claim of the Bristol patent.

Int. 5. Is it or not found in Complainant's Exhibit Old Snap Hook, supposing that snap to have such a spring as that shown in Judd's patent of 1864 ?

Ans. Yes, the Complainant's Exhibit Old Snap Hook has a swinging tongue with a recess in its rear end adapted for receiving a spiral spring, and under the supposition referred to in the question, contains the combination referred to in the first claim of the Bristol patent.

*Earle's testimony [Comp's. expert], page 19 record :*

Int. 4. I infer then, that if you agreed with Mr. Shepard in understanding the first claim of the patent to include any form of swinging tongue so mounted as to be capable of oscillation, and resting in a recess of any form, you would agree with him in his answer to Int. 4, in which he says he finds substantially the same combination in the exhibit "Hull Patent" and "Exhibit Palmer and Simmons Patent" and the exhibit "Judd Patent of 1864." Is this inference correct ?

Ans. It is, and that state of the art is what I endeavored to state on my previous examination, and as exhibited by the Judd Patent, that is, complainant's exhibit "Old Snap Hook."

Int. 5. Mr. Shepard is asked by Int. 6 "Suppose a more limited construction of that first claim, wherein the form of the recess in the tongue shall be made essential, to wit : a combination of a tongue having a side recess with a torsional spring in such recess. Then is, or not, the combination found in any of the prior patents or exhibits made under them ?" and he answers : "It is in the Hull patent and the exhibit made under it, also in the Palmer and Simmons patent and the exhibit made under it." Will you please state to what extent you agree with Mr. Shepard in his testimony on this point ?

Ans. If the claim were to be construed as broadly for a tongue having a recess in its side, within which a torsional spring was arranged, then the Hull patent and Palmer and Simmons patent would show such a recess and spring.

[*Page* 15, *record*:]

×-Int. 9. Do you find in the Complainant's Exhibit "Old Snap Hook" a combination of the tongue with the spiral spring where the spring works on the torsion principle and rests in a recess in the rear end of the tongue?

Ans. Broadly, considered, yes. * * *

CASES.

"An inventor must be taken to know of what his invention consists and his patent does not secure to him the exclusive right in anything more than he claims."

*Rich* v. *Close*, 4 Fish. P. C. 282, Woodruff, J.

"A chair is produced * * * which contains the combination of the second claim, unless that claim should be construed as confined to a chair having an arrangement not described in the claim itself; that is, to such chairs, and only such, as are the subject of the first claim.

I see no ground for thus limiting the second claim, which would seem to have been made broad on purpose to exclude a class or classes of chairs not included in the first claim."

*Stewart* v. *Mahoney*, 5 Fed. Rep. 303, 1879, Lowell, J.

"The patentee's exclusive right is enforcible only within the limits of his own definition of it. What he has not then distinctively claimed, much more what he has not claimed at all, can not be injected into his claims, even though that may be necessary to save his patent." * * .

"When this is done the object contemplated by the claim is completely fulfilled, and no other part of the invention, which does not necessarily pertain to the special office stated in the claim can be considered as embraced in it."

*Case* v. *Johnson*, 16 O. G. 718, 1879, McKennan, J.

"The drawing could and should be looked at, if necessary, in order to explain an ambiguous or doubtful specification and to make the invention capable of being understood and used. But it cannot supply an entire want of any part of a specification or claim in a suit upon a patent.".

*Tucker* v. *W. E. M. & R. M. Co.*, 1 Fed. Rep. 139, 1880, Wheeler, J.

"The claim is not limited to an air guide of this form, and the specification does not assign any peculiar merit or claim any new

result as the product of its conformation. No particular form of air guide then can be considered an essential part of the invention."

*Case* v. *Johnson*, 16 O. G. 718, 1879, McKennan, J.

*Barry* v. *Gugenheim*, 5 Fish. 455.

"It becomes necessary for the complainant now, in view of the evidence showing the prior state of the art, to abandon the real claims of the patent which are for a peculiar arch of hollow tile supported by girders to be used in the walls or in the ceilings of buildings, and to substitute a claim for a flooring with air spaces for ventilation and an arch of a special construction which is peculiarly contrived to form the ceiling of the room below.

* * * * * * * *

The patentee describes the arch as provided at its end-sections with a recess 'to catch over' the bottom flanges of the iron girders when his arch is used for ceilings, but he does not suggest any special advantage arising from the form of the recess. The recess was apparently designed to assist in supporting the arch as a locking device. If it has any advantages over those which were used for the same purpose by others previously arising from its form, the form should have been described. The form is shown in the drawings, but obviously the language of the description does not confine the patentee to any particular form.

* * * * *

It is quite useless to attempt to sustain the patent upon refined distinctions in minor details in structure which the patentee evidently never contemplated, and which certainly are not within the claims as expressed in the patent."

*Fryer* v. *Maurer*, 20 Fed. Rep. 916, Wallace, 1884.

"It was insisted in argument by appellant's counsel that one of the features of the process described in the Olmsted patent was the allowing of the wax or paraffine covering to cool before compressing it upon the wire, and as this was not done in the Dundonald or Baudouin process, they did not anticipate the Olmsted process. But neither the specification nor claim of the Olmsted patent mentions as a part of the process the cooling of the wax or pariffine coating before compressing it upon the wire. The appellant's counsel, however, contends that it must be considered a part of the process because the polished appearance of the surface of the covering described in the specification is the result of allowing the paraffine or wax to cool before compressing it upon the wire. But clearly a patentee cannot claim the benefit of an element of his invention thus vaguely and indefinitely hinted at.

* * * * *

That part of the alleged invention is not even referred to in the most distant manner in the claim. It has been held by this court that 'the scope of letters-patent should be limited to the invention covered by the claim; and though the claim may be illustrated, it cannot be enlarged by the language in other parts of the specification.' *Railroad Co*, v. *Mellen*, 104 U. S 112."

*Western Electric Mfg. Co.* v. *Ansonia Brass & Copper Co.*

5 Sup. Ct. Rep. 941, Sup. Ct. 1885.

If the court will, of itself, make this claim into a different claim, by the exercise of constructive powers; if the court will inject into this claim limitations which are not in the language of the claim, and not within the intent of the patentee, then it will need further consideration. Otherwise not.

## COMPLAINANTS' CLAIM VOID BECAUSE ANTICIPATED.

### B.—Construing it by the Prior Art.

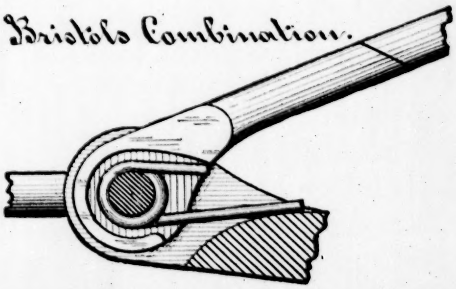
The claim is:

"The combination of the tongue (*g*) with the spiral spring (Fig. "4) when the spring works on the torsion principle and rests in a "recess (as *r*) in the rear end of the tongue, substantially as herein "described."

This combination is illustrated in the next following cut.

BRISTOL'S COMBINATION.

(Harness Hook, Pat. May 16, 1865, No. 47,764.)

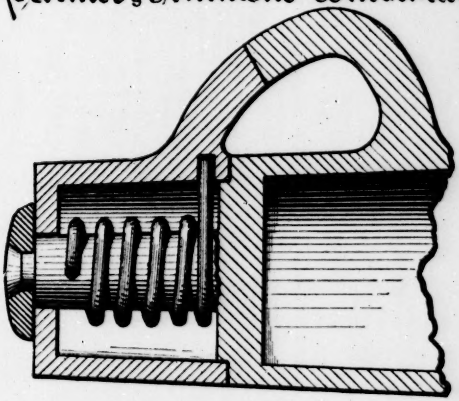


Again let the prior art be illustrated:

PALMER & SIMMONS' COMBINATION.

(Pat. Sept. 7, 1852, No. 9,252.)

Palmer & Simmons Combination



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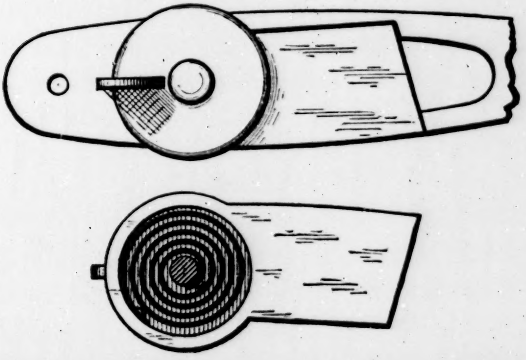
HULL'S COMBINATION.

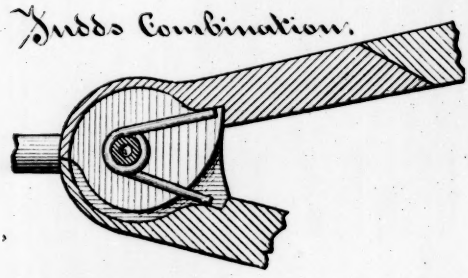
(Pat. June 21, 1859, No. 24,462.)

Hulls Combination



JUDD'S COMBINATION.

(Pat. Dec. 13, 1864, No. 45, 414.)




In all of these devices of the prior art there is the combination of (1) the tongue and (2) a spiral, torsional spring resting in a recess in the rear of the tongue. Mr. Earle, complainant's expert, admits this: he also admits that even if the form of the recess be limited to a recess in the *side* of the tongue that such combination is found in the device of Hull and the device of Palmer and Simmons; also that the Judd snap and the Bristol snap are substantially the same in operation, after the parts are combined.

*Earle's testimony*, [*page* 15, *record*]:

×-Int. 9 Do you find in the complainant's Exhibit "Old Snap Hook" a combination of the tongue with the spiral spring where the spring works on the torsional principle and rests in a recess in the rear end of the tongue?

Ans. Broadly considered, yes. * * *.

[*Page* 19, *record*]:

Int. 4. I infer then, if you agree with Mr. Shepard in understanding the first claim of the patent, to include any form of swinging tongue so mounted as to be capable of oscillation and having a spiral spring working on the torsional principle, and resting in a recess of any form, you will agree with him in his answer to Int. 4, in which he says he finds substantially the same combination in the exhibit "Hull Patent" and exhibit "Palmer and Simmons Patent," and the exhibit "Judd Patent of 1864." Is this inference correct?

Ans. It is, and that state of the art is what I endeavored to state in my previous examination, and as exhibited by the Judd Patent, that is, complainant's exhibit "Old Snap Hook."

Int. 5. Mr. Shepard is asked by Int. 6, "Suppose a more limited construction of that first claim, wherein the *form* of the recess in the tongue shall be made essential, to wit.: a combination of a tongue having a *side recess* with a torsional spring in such recess. Then, is or not, the combination found in any of the prior patents or exhibits made under them?" and he answers: "It is in the Hull Patent and the exhibit made under it, also

in the Palmer and Simmons patent and exhibit made under it." Will you please state to what extent you agree with with Mr. Shepard in his testimony on this point?

Ans. If the claim were to be construed as broadly for a tongue having a recess in its side, within which a torsional spring was arranged, then the Hull patent and Palmer and Simmons patent would show such a recess and spring.

[*Page 16, record*]:

×-Int. 17. When the parts of Complainant's Exhibit "Old Snap Hook," are assembled together in normal working order, and the parts of Complainant's Exhibit "Complainant's Snap Hook," are also assembled together in working order, do or do not the spring of both of them have ends taking their bearings one end upon the body of the hook and one end upon the tongue, in substantially the same manner?

Ans. Substantially the same; yes, sir.

Now then, what was the change over the prior art which Bristol made? In the Judd snap-hook there is the combination of the tongue with the spiral torsional spring resting in a recess in the rear of the tongue; and the relation of the Judd spring to the tongue and to the body, is precisely the same as in the Bristol snap; in both devices both ends of the spring project forward, one end rests on the body and the other on the tongue; Mr. Earle admits so much. Now, what was the change in the Judd snap—as regards the combination of tongue and spring—which Bristol made?

It consisted, wholly, in omitting one of the side ears of the Judd recess, so as to leave the recess open at the side.

Precisely that feature of a *side* recess is present in the tongue of Palmer and Simmons and that of Hull.

Bristol imported into the Judd snap the feature of *omission* which was taught him by the device of Palmer and Simmons and also by that of Hull.

The Supreme Court has most explicitly settled the legal principle that to take an existing structure and import into it a feature found in another and analogous existing structure, when the feature after importation serves the same or similar purpose it served before importation is not patentable invention.

CASES:

A patentee of an improvement in locomotives claimed:

"The employment in a locomotive engine of a truck or pilot wheels fitted with the pendent links to allow of lateral motion to the engine as specified, whereby the drivers of said engine are allowed to re-

main correctly on the track in consequence of the lateral motion of the truck, allowed for by said pendent links, when running on a curve, as set forth."

The court found that such a truck had never before been applied to a locomotive, but had been applied to a car, and thereupon said:

"The application of an old process, or machine, to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent even if the new form of result has not before been contemplated."

The court further said:

"In the case at bar, the old contrivance of a railroad truck, with the swiveling king-bolt, transverse slot, pendent divergent links, already in use under railroad cars, is applied in the old way, without any novelty in the mode of applying it, to the analogous purpose of forming the forward truck of a locomotive engine. This application is not a new invention and therefore not a valid subject of a patent."

*Pa. Railroad Co.* v. *Locomotive Engine Safety Truck Co.*, 110 U. S. 490, Sup. Ct., 1884.

In another case a patentee of an improvement in stoves claimed:

"The detachable base-pan or flue-shell *D*, attached to the body at a point near the center of the back plate of the stove by means of hooks *a a* cast on the base-pan, and pins *b b* on the stove-body, substantially for the purposes herein set forth."

The court found that no base-pan had ever been attached to a stove in this way before, but another part had been attached to a stove in the same way, and thereupon said:

"In view of the state of the art there was no invention in claim 1 of the patent in using to attach the base-pan an old mode used in attaching other projecting parts of the stove."

*Bussey* v. *Excelsior Mfg. Co.*, 26 O. G., 733, Sup. Ct., 1884.

In another case a patentee of an improvement in bail-ears made a claim as follows:

"The compound staple-fastening, *d*, for bails made with the diagonally cut penetrating points, 2 and 3, loop, 4, and body, 5, said diagonally cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth."

Thereupon the court said:

"The gist of the invention * is to cut the two penetrating ends of the wire diagonally, and in such a way that while the staple is being driven the cut faces will both of them be on the lower side, and the two penetrating ends will both of them incline upwardly. It is shown to have been commonly known that the effect of a bevel, or a diagonal cut, on a penetrating point was to force the point, in being driven, in a direction away from the bevel or cut. * * . In view of this state of the art there was no patentable invention and nothing more than mere mechanical skill in putting the diagonal cuts or bevels on the same side of each leg of the staple so as to give both points, in driving, an inclination in the same direction, that direction being one away from both bevels, and in using the device to fasten a bail."

*Double Pointed Tack Co.* v. *Two Rivers Mfg. Co.* 109 U. S. 117, Sup. Ct. 1883.

In a case decided by his Honor, Justice Gray, in the Circuit Court for the District of Massachusetts, the improvement, being one in wrenches, consisted in the combination of a wrench-bar, a step-plate (which supported an adjusting-screw) and a nut under the step-plate. The wrench-bar and step-plate were found in one prior wrench, and the nut, without the step-plate, in another.

The court said:

"The application to the bar of the Coes wrench for the purpose of supporting and securing the step and resisting the strain, of a nut already in use for the same purpose on the Hewitt or Dixie wrench, lacks the novelty of invention requisite to support a patent within the decisions of the Supreme Court."

*Collins Co.* v. *John H. Coes, et al.* 28 O. G. 1010.

In another case the patented internal revenue stamp consisted of a combination of three parts: (1) a part designed to become a stub when the stamp proper is separated therefrom, and displaying a serial number; (2) a constituent part of the stamp proper designed for permanent attachment to the barrel; (3) a constituent part of the stamp proper displaying the same identifying serial number as the stub, which part, after the stamp proper had been affixed to the barrel, bore such relations to the permanent part that it could be removed therefrom so as to retain its own integrity, but mutilate and thereby cancel the stamp by its removal. The first and second elements were well known;

and the third, so far as its contents were identical with those on the stub, was not new. Thereof the court said:

"Although we find [it] to be new in this sense that it had not been anticipated by any previous invention, of which it could therefore declared to be an infringement, yet, is not such an improvement as is entitled to be regarded in the sense of the patent laws as an invention."

*Hollister, Coll'r,* v. *Benedict Mfg. Co.* 5 Sup. Ct. Rep. 717, Sup. Ct. 1885.

In another case complainant's patent was for a device for permitting a horse-car driver to open and close the rear door, a rock-shaft extending from end to end of the car being a chief factor in the combination. Substantially such a rock-shaft had been used for operating a window-shutter from inside the window, and this latter device was held to substantially anticipate the patented device.

*Stephenson* v. *Brooklyn Cross-Town R. Co.* 31 O. G. 263, Sup. Ct. 1885.

Let the principle of these cases just cited be applied to the case at bar. Bristol, the complainants' patentee, took the Judd snap-hook and imported into it the feature of omitting one side of the recess. That same feature of omission, giving a tongue with a side recess, was present in the device of Palmer & Simmons and also present in the device of Hull. Whatever advantage may have resulted from the importation into the Judd snap-hook of the omission of one side of the recess, was equally present in the device of Palmer & Simmons and in the device of Hull.

At this point let us gather together and consider all the testimony offered by complainants as to the advantages arising from the Bristol combination of tongue and spring.

*Earle's testimony,* [*Page* 12, *record*]:

Ans. 3. * *. The first part of the invention of Bristol consisted in an improvement in the construction of the tongue by making the recess for the spring in one side of the tongue instead of upon the underside, whereby one of the cheeks on the tongue was dispensed with, and the drilling of the pivot-holes might be avoided, as in molding the Bristol tongue with the side recess, the pivot-hole in the pattern would leave a core in the sand to form the pivot hole in the tongue, and so that the coil of the spring would be introduced into the recess in the tongue at the side. * * .

[*Page* 14, *record*]:

×-Int 7. What is the special advantage or utility consequent upon making such parts of a snap hook, as are referred to in the first clause of the claim of the patent sued on, in the manner described in that patent?

Ans. As I have before stated, it enables the tongue to be molded and cast easier than the previous construction of recess tongue; it also permits the tongue to be cast with the pivot perforation formed in the process of casting, whereby the drilling of the cheeks may be avoided; it also saves one of the cheeks or sides of the recess in the previous construction, hence less metal is used in the formation of the hook; again, in assembling the parts, the spring is more conveniently arranged in its place in the recess, than it can be done in the recess of the previous hook. By previous hook or tongue I mean the Judd patent, to which I before referred.

×-Int. 18. Then the advantages incident to the construction described in the Bristol patent consist, do they not, substantially as you look at the matter, in an advantage in the matter of casting and advantage in the matter of assembling the parts?

Ans. Yes, and producing a hook of cheaper construction. It also enables making the hook so that it will be less liable to clog by lodgment of dirt or foreign substance in the recess in the body of the hook, between the cheeks, because forming the recess in the side of the tongue, as in Complainants' patent, the wall of the recess extends around below the pivot; this permits making the recess in the hook to receive the head or body of the tongue through the back so that the dirt will readily work through the opening below the spring, being protected by the wall around the recess in the tongue, as readily seen in Exhibit "Complainant's Snap Hook," whereas in the Judd or Exhibit "Old Snap Hook" the recess in the tongue is necessarily open at the bottom, hence to properly protect the spring, there is no opening through the back of the hook, and hence not the escape of dirt, etc., that there is in Complainant's hook, therefore, the hook is not only cheaper in consequence of the peculiar recess of Complainant's patent, but is better than the old snap hook upon which it was an improvement.

The foregoing is believed to comprise every word of evidence offered by complainants to show the advantages of the Bristol combination of tongue and spring. Let each of these be set out separately and considered.

*First.* In Bristol's construction "the drilling of the pivot holes might be avoided," as these holes might be *cast.*

*Answer.* So they can be and are in the device of Palmer & Simmons and the device of Hull. Furthermore, there is nothing in this pretence as Mr. Earle elsewhere admits, by admitting that Bristol's improvement has no relation to *casting.*

[*Page* 17, *record*]:

"×-Int. 23. I suppose you don't undertake to say that complainant's patent requires the snap-hook tongue to be cast do you?

Ans. No sir, if a person should be disposed to make it of wrought metal, as in forging, they could undoubtedly do it, * * *"

That there is nothing in this pretence is further evidenced by the fact that while defendants drill their pivot-hole, complainants still maintain that defendants infringe. Furthermore, the improvement under consideration is a certain combination, to wit, a combination of the tongue and spring. Casting the tongue can not possibly have anything to do with that combination. Casting the hole can not affect that combination.

*Shepard's testimony*, [*page 29, record*]:

Int. 12. Complainants' expert thinks that the Bristol tongue has an advantage in that it permits the hole for the pivot spring to be cast, and thus saving the drilling thereof. Is or not the same advantage present in any of the prior structures?

Ans. It is, the Hull patent and exhibit made under it, and in the Palmer and Simmons patent and exhibit made under it.

Int. 13. Does the presence or absence of such an advantage, if advantage it be, have any practical effect on the combination of the tongue and spring?

Ans. None whatever.

Int. 14. Is any such advantage present, if advantage it be, in the snap hook complained of? (Complainants' Exhibit Defendants' Snap Hook.)

Ans. The hole through the tongue in the snap hook, Complainants' Exhibit Defendants' Snap, is a drilled hole, and consequently whatever advantage there may be incasting pivot holes is not present or utilized in said exhibit.

*Second.*—Bristol's construction "enables the tongue to be *molded and cast* easier than the previous construction of recessed tongue. * * By previous hook or tongue I mean the Judd patent to which I before referred."

*Answer.* It has just been shown by reference to Mr. Earle's answer to ×-Int. 23, that complainants admit that whether the tongue be or be not *cast*, has nothing to do with the presence or absence of the Bristol improvement. Furthermore, the court can readily see for itself that whatever advantage in casting may appertain to a side recess, as compared with the recess of the Judd snap hook, pertains equally to the Palmer and Simmons tongue and to the Hull tongue. Furthermore, the combination of the tongue and spring can have nothing to do with making the tongue cast or wrought.

*Shepard's testimony*, [*page 9, record*]:

Int. 9. Complainants' expert thinks that the Bristol tongue with the recess in the side can be cast easier than the tongue of the Complainants' Exhibit Old Snap Hook. Supposing him to be right about this, is or not the same true of the tongue in the device of the Hull patent?

Ans. The tongue in the device of the Hull patent can be cast as easily and cheaply per pound as can the tongue of the Bristol patent.

Int. 10. Supposing it to be true that the Bristol tongue can be cast easier than any of the prior tongues, does such a fact have anything to do with practically combining the tongue and the spring?

Ans. It does not. The combination of the tongue and the spring would be precisely the same whether the tongue is cast or otherwise formed, and the specification makes special reference to forming it in other ways than casting.

Int. 11. Does or not the difficulty or ease with which the Bristol tongue may be made, by casting or otherwise have any effect on the combination of the tongue and spring?

Ans. It does not.

*Third.* Bristol's construction "saves one of the cheeks or sides in the previous construction, hence less metal is used in the formation of the hook. * * By previous hook or tongue I mean the Judd patent, to which I before referred."

*Answer.* The court can readily see that whatever saving of metal is attained by leaving off one side of the recess of the Judd patent, is saved equally and in like manner in making the side recess of the Palmer and Simmons tongue and the side recess of the Hull tongue. Furthermore, when did a court ever sustain a patent for a change in shape on the ground that it effected a slight saving in the quantity of metal used? Again, how can a slight saving of weight in the tongue affect the *combination* of the tongue and spring?

*Shepard's testimony, [page 27, record]:*

Int. 15. Complainants' expert thinks that there is a saving of metal in the Bristol tongue, as compared with the tongue of Complainants' Exhibit Old Snap Hook; will you compare the tongue of Complainants' Exhibit, Complainants' Snap, with the tongue of Complainants' Exhibit Old Snap Hook, and state how this is?

Ans. I fail to see any advantage on that point, because in the tongue of Complainants' Exhibit Snap the flange which surrounds the recess fully overbalances all advantage there is gained in saving of metal by the employment of two lips, through which to pivot the tongue, as shown in the construction of Complainants' Exhibit Old Snap Hook. In tongues of the same size in these two constructions the amount of metal would be substantially the same.

Int. 16. If any such advantage be present in the Bristol tongue, does it or not have any effect on the combination of the tongue and spring?

Ans. It does not.

*Fourth.* By the Bristol construction "the spring is more conveniently arranged in its place in the recess, than it can be done in the recess of the previous hook. By previous hook or tongue I mean the Judd patent to which I before referred."

*Answer.* The court can readily see for itself that whatever advantage over the assembling of tongue and spring in the Judd snap hook arises from the use of a side recess is equally attained in assembling the tongue and spring of Palmer and Simmons, and in assembling the tongue and spring of Hull's device.

*Shepard's testimony, [page 27, record]:*

Int. 17. Complainants' expert thinks that the Bristol tongue and spring have an advantage in that they are more easily assembled with the other parts of the snap hook than is the case in prior structures. What have you to say about that?

Ans. I think he is correct, provided he refers to the assembling of them with the hook described in the patent and in the manner therein specified; but they can not be assembled with the bodies of snap hooks which were then known in the prior art, to any better advantage than can tongues which were also known in the prior art. These features of the Bristol patent which relate to assembling the parts have nothing whatever to do with the combination referred to in the first claim of the Bristol patent, but belonging exclusively to the second claim.

Int. 18. Can the parts which are mentioned in the first claim of the Bristol patent be, of themselves, more easily assembled than corresponding parts of the prior structures?

Ans. They cannot.

Moreover, if it were true that some slight change was gained in assembling the tongue and spring through the use of a *side* recess, it is equally true that the Palmer and Simmons tongue and the Hull tongue, both with the side recess, taught Bristol how to attain that change, leaving him no place whatever for the exercise of patentable invention.

*Fifth.* The Bristol construction "enables making the hook so that it will be less liable to clog by lodgment of dirt or foreign substance in the recess of the body of the hook between the cheeks, because forming the recess in the side of the tongue, as in complainants' patent, the wall of the recess extends around below the pivot; this permits making the recess in the hook to receive the head or body of the tongue through the back, so that the dirt will readily work through the opening below the spring, being protected by the wall around the recess in the tongue, as readily seen in Exhibit "Complainants' Snap Hook," whereas in the Judd or Exhibit "Old Snap Hook," the recess in the tongue is necessarily open at the bottom, hence to properly protect the spring there is no opening through the back of the hook, hence not the escape for dirt, etc., that there is in complainants' hook."

*Answer.* Mr. Earle now quits the combination of the two elements of (1) tongue and (2) spring and discusses another combination, to wit, the combination of the (1) tongue, (2) spring and (3) hook. The *hook* is not a part of the combination under consideration. When we approach a consideration of a combination of the spring, the tongue and the hook, the mode of combining these parts becomes essential; that mode of combining is covered by the second claim, and complainants' make no pretence that defendants infringe that second claim. The whole of this so-called advantage, now attempted to be set up by Mr. Earle, concerns the hook or snap-body. Let it be confined to the combination of the tongue and spring: then whatever advantage results from a recess having an opening *beneath* the spring is clearly found in the Judd patent; and whatever advantage results from a protecting wall around the recess is found in the patent of Palmer and Simmons and that of Hull. The additional feature discussed by Mr. Earle is a hole or opening down through the *hook*, with which this claim has no concern. And for that matter, Mr. Bristol was not the inventor of such a hole down through the body of the hook, for it is to be found in the patent of C. S. Abeel, No. 41,131, dated January 5, 1864.

*Shepard's testimony* [*page* 28, *record*]:

Int. 19. Complainants' expert thinks that the Bristol snap has an advantage in that an opening in the body allows dirt to drop out of the joint. Is or not that feature of advantage, if such it be, present in any of the prior patents or structures?

Ans. It is. Such an advantage is shown in Exhibit Abeel Patent.

Int. 20. Does the presence or absence of such an opening in the body of the hook alter or modify the combination of tongue and spring?

Ans. It does not.

This careful consideration of every point of advantage claimed for Bristol's combination of tongue and spring shows clearly, as defendants believe, that there was no patentable invention whatever exercised by Bristol in combining the tongue with the spring, and that consequently the first claim of the Bristol patent in suit is wholly null and void.

## THE ONLY POSSIBLE CONSTRUCTION OF BRISTOL'S FIRST CLAIM LEAVING IT SEMBLANCE OF VALIDITY.

The claim is:

"The combination of the tongue (*g*) with the spiral spring (Fig. 4) "when the spring works on the torsion principle and rests in a recess "(as *r*) in the rear end of the tongue, substantially as herein des- "cribed."

*Earle's testimony* [*page* 19, *record*]:

The claim is not for a recess broadly, and spring arranged therein, so as by its action to close the hook, as that was well known in the state of the art and shown in the drawings and models of the U. S. Patent Office prior to the granting of the patent to Bristol. It is a peculiar recess, designated as "*r*," substantially as described in the specification and drawing which form a part of the specification, and as I have already mentioned.

Int. 4. I infer then, that if you agree with Mr. Shepard in understanding the first claim of the patent, to include any form of swinging tongue so mounted as to be capable of oscillation and having a spiral spring working on the torsion principle, and resting in a recess of any form, you would agree with him in his Ans. to Int. 4, in which he says he finds substantially the same combination in the exhibit Hull Patent, and exhibit Palmer and Simmons Patent and the exhibit Judd Patent of 1864. Is this inference correct?

Ans. It is. And that state of the art is what I endeavored to state in my previous examination, and as exhibited by the Judd Patent, that is, Complainants' Exhibit Old Snap Hook.

Int. 5. Mr. Shepard is asked by Int. 6, "Suppose a more limited construction of that first claim, wherein the form of the recess in the tongue shall be made essential, to wit: a combination of a tongue having a side recess with a torsional spring in such recess. Then, is, or not, the combination found in any of the prior patents or exhibits made under them?" And he answers: "It is in the Hull patent, and the exhibit made under it, also in the Palmer and Simmons patent and exhibit made under it." Will you please state to what extent you agree with Mr. Shepard in his testimony on this point?

Ans. If the claim were to be construed as broadly for a tongue having a recess in its side, within which a torsional spring was arranged, then the Hull patent and Palmer and Simmons patent would show such a recess and spring.

It will be seen from the above that complainants concede that Bristol's claim cannot cover either the broad combination of the tongue and spring or even the combination of the tongue and spring when the spring is in a *side* recess in the tongue.

Can it then cover anything more than the combination of the tongue and spring when the shape of the recess is precisely what Bristol shows, and also when the manner of the combination of tongue and spring is precisely that which Bristol shows? Defendants think not.

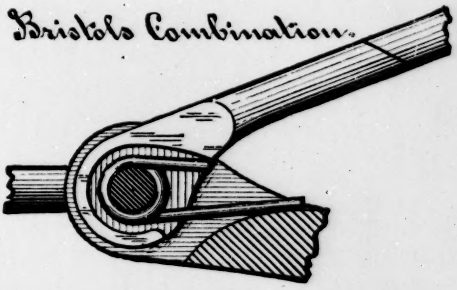
The attention of the court is called to two features of the shape of Bristol's recess and to a third feature which consists in the mode or manner in which Bristol's tongue and spring are actually combined, to wit:

*First.* The peripheral wall of Bristol's recess (except where it is broken away) is *round*, thereby affording no rest for either end of the spring.

*Second.* The opening in the peripheral wall of Bristol's recess is such as to permit both ends of the spring to project tangentially forward, this being described in Bristol's specification in language as follows:

"The spring, Fig. 4, will rest in and be inclosed by the recess *r*, with the two tangential parts *h* and *i* pointing toward the hook *a*."

This construction we again illustrate:




*Third.* Bristol's manner of combining the tongue and spring is such that the ends of the spring do project tangentically forward.

Defendants contend that Bristol's first claim cannot possibly have any construction broader than one which will limit it to the possession of the three features just set forth.

*Authorities on this point:*

In a late case by this court complainant's patent was for an improvement in making carriage-thill shackles and consisted in disposing the body of the blank out of a straight line, so as to give a surplus of metal for the final formation of the back. In a prior patent this

surplus was attained by certain downward projections. In another prior patent it was attained by sharp lower corners with curved arms. In view of this state of the art complainant's patent was restricted by construction to his exact shape of the blank, and the defendant, who used a slightly different shape, was held not to infringe.
*Clark* v. *Beecher Mfg. Co.*, 31 O. G. 1169, Sup. Ct., 1885.

In another case before this court where the patent was for a valve, the claim was:

"The combination of the valve *C*, stem *d*, spring *E*, adjustable cap *D*, and pin-hole *d*, &c."

Thereof the court said:

"The evidence shows that Bailey was not the first to conceive the idea of a device for opening or closing rigidly an automatic valve. The same thing was done by means of wedges and screws and other devices. He cannot therefore cover by his patent all the devices for producing this result, no matter what their form or mode of operation. The claim must be confined to the specific device described in the specification and claim, namely, a pin hole and pin. If this construction of the claim be adopted it is clear that no infringement is shown, for the appellees do not use a pin-hole and pin for holding their valve open or closed, but a screw, sleeve or cap."
*Blake* v. *San Francisco*, 5 Sup. Ct. Rep., 692, Sup. Ct., 1885.

In another case before this court the claim was:

"I claim the use of a drip-box, or leak chamber, arranged above the closet and below and around the supply-cock, substantially as described."

In defendant's structure "the drip-box is [was] cast on the side of the trunk." Various devices, more or less closely approaching the claim, were found in the prior art, and thereupon the court said:

"In view of this state of the art the claim must be limited, as defined by its language and that of the specification, to a drip-box 'arranged upon the top of or over the trunk;' 'arranged upon the top plate;' cast 'upon the cover;' 'arranged above the closet.'"

And defendants were held not to infringe.
*Thompson* v. *Boisslier*, 31 O. G. 376, Sup. Ct., 1885.

In another case before this court the claim was:

"The neck-pad having an inner lining of crimped leather and provided with straps to allow its being fastened to the collar, as herein shown and described, for the purposes specified."

Complainant's patent described a stuffed pad.

"The thing made and sold by the appellant, which was charged to be an infringement of the appellee's patent, was a single piece of crimped leather having a piece of sheet metal so shaped as to fit it, riveted to its upper side in order to stiffen it and preserve its crimped form, and provided with straps to fasten it to the collar." The court said that complainant's patent, in order to give it validity, "is to be construed as a combination consisting of a stuffed pad, having an inner lining of crimped leather and straps to fasten the pad to the collar," and held that defendant did not infringe.

*Voss* v. *Fisher*, 5 Sup. Ct. Rep., Sup. Ct., 1885.

In another case before this court, where the patent was for an improvement in cultivators, the claim was:

"The combination of the slotted beam *A*, shank *B*, brace-bar *C* and bolt *D*."

The court said:

"The evidence shows that the shanks or standards of plows, cultivators and seeding machines, have been used in a great variety of forms. * * * The patent of the plaintiffs therefore stands on narrow ground, and to sustain it it must be so construed as to confine it substantially to the form described in the specification." And defendant, whose brace was of another form, was held not to infringe.

*Rowell* v. *Lindsay*, 5 Sup. Ct. Rep., 507, Sup. Ct., 1885.

In another case before this court, where the patent was for an improvement in plows, the claims were:

"1. The inclining the standard and land-side so as to form an acute angle with the plane of the share.

2. The placing the beam on a line parallel to the land-side within the body of the plow and its center, nearly in the perpendicular of the center of resistance.

3. The forming the top of the standard for brace or draft."

There was no reference in the claim to the standard being "jogged into the beam." But the specification so described it. In view of the state of the art the court held that the claims must be limited to

that case where the standard is "jogged into the beam," and as defendant's standard was not thus "jogged into the beam," defendants were held not to infringe.

*Prouty* v *Ruggles*, 16 Peters, 336, Sup. Ct., 1842.

This principle of the construction of claims is clearly stated by this court in language as follows:

"If one inventor precedes all the rest and strikes something which includes and underlies all they produce, he acquires a monopoly and subjects them all to tribute. But if the advance toward the thing desired is gradual and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces and every other inventor is entitled to his own specific form so long as it differs from those of his competitors and does not include them."

*Railway Co.* v *Sayles*, 97 U. S., 555, Sup. Ct.

There is a certain vicious mode of construction sometimes contended for, to wit:—that a claim in a patent is to be construed to cover everything as to which it is not limited by the prior art. This is well negatived in the following:

"It would be wrong to stretch an invention beyond the legitimate bounds of the discovery so as to exclude all other inventions within the same field of operation.

* * * * *

No one can take something old and apply it in a new way, or in a new form, so as to produce a particular result, and be protected beyond the particular way or form or device, and the application which he has made."

*Fuller* v *Yentzer*, 1 Banning and Arden, 520, Wallace, 1874. Affirmed by Sup. Ct., 4 Otto, 288.

It is a settled principle of construing a claim for a combination of old parts, when that combination is new only in certain matters of detail, that such claim must be limited to such matters of detail. No construction can be given to Bristol's first claim which excludes from it either of the following features:

*First.* A recess for the spring having a peripheral wall affording no rest for either end of the spring.

*Second.* Such a shape of opening in the peripheral wall of the recess as permits both ends of the spring to project tangentially forward.

*Third.* Such a spring and such a combination of tongue and spring that both ends of the spring do project tangentially forward, one end bearing against the underside of the tongue proper, and the other end against the hook body.

*Shepard's testimony :*

(See Ints. 6, 7 and 8, pages 25, 26 of record.)

## DEFENDANTS DO NOT INFRINGE.

It has just been shown that in order to leave Bristol's first claim even a semblance of validity, his combination of tongue and spring must be limited to such a shape and combination of parts as has the following features :

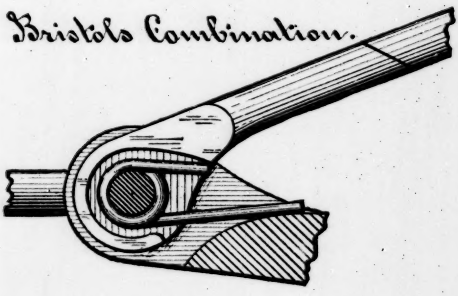
*First.* A recess for the spring having a peripheral wall affording no rest for either end of the spring.

*Second.* Such a shape of opening in the peripheral wall of the recess as permits both ends of the spring to project tangentially forward.

*Third.* Such a spring and such a combination of tongue and spring that both ends of the spring do project tangentially forward, one end bearing against the under side of the tongue proper, and the other end against the hook body.

In this connection we again illustrate :—

BRISTOL'S COMBINATION.

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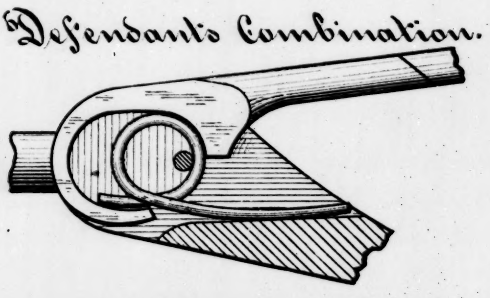
Compare with this—

DEFENDANT'S COMBINATION.



A very brief comparison of defendant's combination with that of Bristol, is sufficient to show that defendant's combination has neither of the three features of limitation above specified, for—

*First.* Defendant's recess for the spring has a peripheral wall affording a rest for one end of the spring. To that end this recess is not round, as in the Bristol snap, but is oblong, so to speak, to the end that in the lower part there may be a rest for one end of the spring. A round recess, like Bristol's, affords no such rest for an end of the spring.

*Second.* In defendant's device there is not such a shape of opening in the peripheral wall of the recess as permits both ends of the spring to project tangentially forward. On the contrary, in defendant's device the shape of the opening in the peripheral wall of the recess is such that only one end of the spring can or does project tangentially forward.

*Third.* In defendant's device there is not such a spring and not such a combination of tongue and spring that both ends of the spring project tangentially forward, one end bearing against the under side of the hook proper, and the other end bearing against the hook body. On the contrary, there is in defendant's device such a spring, and such a combination of tongue and spring, that only one end of the spring projects tangentially forward, while the other end projects tangentially backward, and in place of bearing against the under side of the tongue proper, it bears against a rest made for it in the rear part of the recess.

*Shepard's testimony,* [*page 29 record*]:

Int. 25. If the terms of the first clause of the claim of the Bristol patent be limited by construction so as to cover the combination of tongue and spring only when such combination as has what is new as compared with the prior art, then in your opinion does or not Complainant's Exhibit Defendant's Snap Hook, embody the improvement or thing described in the Bristol patent and recited in the first claim?

Ans. It does not, because the features which it has in common with the Bristol snap are found in the prior art.

Int. 26. What experience, if any, have you had in snap hooks, and what acquaintance, if any, have you had with the snap hook art?

Ans. I have been familiar with the manufacture and use of snap hooks of different kinds for more than twenty-five years. During the last twelve years I have frequently made examinations into the art relative to snap hooks and prepared many applications for patents for snap hooks, and have frequently been consulted with reference to patents upon the same.

Int. 28. Did you ever, prior to the beginning of the present suit, see or hear of such a recess for the spring, or such a manner of combining the spring with the tongue as is embodied in the snap hook complained of?

Ans. I never did, that is when considered in relation to the details of construction; but of course the general combination of recessed tongue with a torsional spring is old, as shown by the several exhibits in this case, but in none of these exhibits or elsewhere have I ever seen or heard of the peculiar form of recess found in Complainant's Exhibit Defendant's Snap, neither a snap having such a recess in its tongue and this peculiar form of spring resting therein.

Int. 29 As the shape of recess and the manner of combining a spring with the other parts shown in the Complainant's Exhibit, Defendant's Snap Hook, any advantage or advantages peculiar thereto?

Ans. Yes, it enables the tongue to be formed with a slight projection of its inside, so as to cover the opening into the recess to a greater extent than can be done when both arms project through said opening. By constructing the spring seat at the rear of the pivot in a slight enlargement of the recess which surrounds the pivot, a spring can be used in which one of the arms projects but a very short distance, and the spring seat can be brought close to the coils of the spring and thereby the coiled portion of the spring is the first portion to be deflected, and as the coiled portion is more sprightly in its action than the tangential arms, I believe that such a construction will make a little quicker and better acting spring than will a spring that has two tangential arms, resting upon spring seats farther from the coil of the spring.

Int. 30. Concisely what is the real improvement described in the Bristol patent?

Ans. The manner of assembling the parts, and the peculiar construction with that end in view. When the parts are assembled the snap is substantially the same in its operation and use, as prior snaps.

Int. 31. Is that invention, or any part of it, present in defendant's snap hook?

Ans. It is not.

The following conclusions appear to be safe and proper. *First*, in view of the prior art there is no patentable invention whatever in what is specified in Bristol's first claim. *Second*, if Bristol's first claim be limited by construction to its details of shape and combination, then defendant's device does not infringe.

# PART II.

## DAMAGES.

Defendant's chief proposition under this head is that provided such a construction is given to complainants' patent as leaves it life and validity as to its first claim, and provided also that defendants' snap-hook is held to infringe that first claim thus construed, it yet follows that only nominal damages should be awarded complainants. This proposition can be thoroughly discussed in a discussion of the damages awarded by the master and confirmed by the court in the trial below.

The Master reports:

"The plaintiffs have suffered damages by the unlawful acts of the defendants, and in two ways:

*First.* Through the enforced reduction in the selling price of their goods, owing to the defendants' competition.

* * * * * * *

The main difficulty in the case has been in ascertaining the extent of this loss or damage, in accordance with recognized rules of law.

*First.* As to damage from enforced reduction in price. The net price for the complainants' hooks for the year preceding December 1st, 1880, was their list price, less a discount of 50 and 10 per cent. On December 1, 1880, they increased the discount to 60 per cent., in order to recover the market that they were losing on account of defendants' competition.

From the list prices, both before and after December 1st, 1880, further deductions were made on account of freight and for cash, the items of which, as regards the several sizes of hooks, appear upon the complainants' Exhibit 'Net Prices.'

The following table shows the net price of the several sizes of the plaintiffs' hooks before the reduction, December 1, 1880, and after that time, as appears from the evidence:

| Sizes. | Before Dec. 1, 1880. | After Dec. 1, 1880. | Am't of reduction per gross. |
|---|---|---|---|
| 6 inch and under, | $4.36 | $3.87 | 49 cents. |
| 1¼ inch, | 5.65½ | 5.02 | 63½ cents. |
| 1½ inch, | 6.05½ | 5.36½ | 69 cents. |
| 1¾ inch, | 6.46 | 5.72½ | 73½ cents. |

The defendants, while not denying that the foregoing reduction in price was made by the plaintiffs at the time stated, contend that it was due, in part at least, to other causes than the competition of the defendants' infringing snap. They refer to the following matters as the basis of such contention:

*First.* That the plaintiffs were introducing a new style or pattern of snap at or about the time their sales fell off. I do not find that this had any effect in reducing their sales.

*Second.* That the plaintiffs raised the price of their snaps the latter part of 1879. A small increase was made by the plaintiffs in the price of their hooks at the time, but I do not find it had any effect in decreasing their sales.

*Third.* The competition in the market of different snap-hooks other than those made and sold by the defendants. The following snaps are referred to under the claim:

Anchor Snap.
Middletown Snap.
Judd & Blakeslee Snap.
O. B. North & Co. Snaps, Nos. 1 and 2.
Mosher Snap.

I do not find that the presence of any of these snaps in the market during the infringing period had any sensible effect in reducing the plaintiffs' sales.

On the other hand, I do find that a sufficient operative cause for such decrease in sales existed in the competition of the defendants' infringing snap. The characteristic feature of the plaintiffs' snap as a finished article by which it acquired its position in the market was the side recess in a swinging tongue. This feature appeared in the defendants' snaps, and they were in direct competition with those of the plaintiffs. This was early recognized by the parties, as appears by the circulars issued by them to the trade. Complainants' Exhibit 'December Circular,' under date of December 17, 1870. Defendants' reply thereto, under date of January 19, 1880, marked Complainants' Exhibit Defendants' Circular No. 1.

"I find that the plaintiffs on the first of December, 1880, reduced the net price of their snaps to the extent indicated in the above table, and that such reduced price continued during the period of infringement. That such reduction in price was made on account of a decrease in the plaintiffs' sales caused by the competition of the defendants' infringing snaps in the market.

"The plaintiffs made and sold from December 1, 1880, to September 20, 1881, 7,697 gross of their snaps. Of these, two-thirds, viz., 5,131 gross, were of the size of one inch and under, and one-third, or 2,566 gross, were over one inch. As appears from the above table, the net reduction on snaps of the size of one inch and under was 49 cents per gross. Of the snaps over one inch it appears

that the bulk sold are of the size of 1½ inches. The net reduction on snaps of this size was 69 cents. It appears that there was a somewhat larger demand for snaps of the size of 1¼ inches than for those of 1¾ inches, and I fix 68 cents as the average reduction on all snaps over one inch in size made and sold by the plaintiffs between December 1, 1880, and September 20, 1881.

The plaintiffs' damages through the enforced reduction in the selling price of their snaps caused by the competition of the infringing snap made and sold by the defendants are as follows:

| | |
|---|---|
| 5,131 gross 1 inch and under—49 cents per gross, - | - $2,514 19 |
| 2,566 gross 1 inch and over—68 cents per gross, - | - 1,744 88 |
| | $4,259 07 |

As to the finding of the master the court below says:

"The present questions in this case arise upon the defendants' exceptions to the master's report. He has reported that * * the plaintiffs suffered damages by the unlawful acts of the defendants in two ways.

1st. Through the enforced reduction in the selling price of their goods caused by the competition of the defendants' infringing snap-hooks, and

* * * * *

The master finds that the plaintiffs' damage in the first of said ways was the sum of $4,259.07, and that no part of the reduction was due to any of the causes which were named by the defendants, the chief one being the alleged competition of different snap-hooks other than those made by them. He further finds that a sufficient operative cause for such damage existed in the competition of the defendants' infringing snap, and that the characteristic feature of the plaintiffs' snap, as a finished article, by which it acquired its position in the market, was the side recess in a swinging tongue, and that this feature appeared in the defendants' snaps, and that they were in direct competition with the plaintiffs' article.

The two material classes of exceptions are to the effect that the evidence did not justify a finding that the plaintiffs' reduction in prices was wholly caused by the competition of the infringing snap-hooks, and that the master found in favor of the plaintiffs their damage upon the sale of the snaps as a completed article containing both patented and unpatented features, whereas he should have found the part of the damage, if any, which resulted from the decrease in price in the patented part of the snap hook.

Upon the first class of exceptions, the defendants say that during the infringing period, other hooks than either theirs or the plaintiffs', having a side recess in a swinging tongue, were in the market and helped the competition and helped to decrease the prices.

It is to be noticed that the damages which are found in favor of the plaintiffs result only from an enforced reduction in prices. The plaintiffs have been manufacturing their hook since 1865. Judd & Blakeslee and the Middletown Tool Co., or its successor, have been their competitors in snap hooks since that date, while the snap hooks No. 1 and 2 of O. B North & Co, have competed with their article for twelve and ten years respectively. No one of these hooks ever affected the plaintiffs' prices. The same is true of the Mosher and Anchor hook, and it may be remarked that there was no evidence of importance upon the part of the defendants tending to show that these other competing snap hooks had an effect in the reduction of prices. The defendants claimed that the O B North & Co. hook was both a competitor and a plain infringer and that therefore, it was unjust to visit upon them all the consequences of the infringement. It is immaterial to the issues of this case whether this snap hook is or is not an infringement of the plaintiffs' patent if it has not reduced their prices. If it has not injured the plaintiffs in this regard, its presence in the market does not lighten the burden of the defendants.

The next and important exception relates to the fact that the master made no apportionment of the reduction in price between the patented and the unpatented parts of the snap-hook.

A harness snap-hook of the general class to which the plaintiffs' article belongs is a little device consisting of a hook and a tongue so actuated by a torsional spring that the hook is prevented from disengagement from the ring to which it may be attached. A hook is of course a necessary part of the device, but the hook part of the various snap-hooks is substantially the same. The difference between the different kinds of harness snap-hooks consists substantially in the methods in which the tongue and spring are constructed and arranged with reference to each other and thus the springing tongue, by which is meant the tongue with the spring, is the distinctive or characteristic part of the device. It is not merely the essential feature of the plaintiffs' hook, but it is the essential feature of all snap-hooks of this class. I do not mean by "essential" that it is the only important part of the completed article, but I mean that it is the part in which consists and which makes the difference in the value of different kinds of snap-hooks as marketable articles. The essential and characteristic feature of the plaintiffs' and defendants' snap-hooks is a swinging tongue with a side recess and the feature makes the article what it has been in the market.

This statement of the nature of the device shows that the principle which is involved by the defendants and which is perfectly true when applied to a certain state of facts, is not applicable to the facts in this case, the principle being that, when the patented thing is a mere improvement in a part of a device, the proof of damages resulting from an infringement must be limited accordingly. The plaintiffs' snap-

hook is an improvement upon the Judd and other snap-hooks, in that it is a new and better way of constructing and arranging the same tongue and the same spring and therefore the defendants say that the damage must be limited to those which result from the improper use of the plaintiffs' improvement upon the Judd hook. But the Bristol snap-hook is not a mere improvement upon the Judd hook. The Judd device has a tongue and a spring made and arranged in a way of its own, which method makes the article as a marketable article. The plaintiffs' snap-hook has its tongue and its spring made and arranged in a certain other way which gives to the device its value as a finished article in the market. But the defendants further say that the device is composed of an unpatented hook and a swinging tongue, and that the enforced reduction in price was fully as much upon the hook as upon the tongue, whereas the master gave the entire reduction as damages, when it was the duty of the plaintiffs to prove and of the master to find, if a sufficient basis was furnished for the finding, how much of the damage was due to the infringement of the patented part. While it is not true that the tongue is the whole of the device or that the hook is not an indispensable part of it, yet the tongue is the peculiar and variable and, as has been said, essential feature in all snap-hooks of this class, and the hook is the unvarying feature to which the tongue is attached. Both together constitute a snap-hook and the patented tongue must, in connection with an unpatented hook, be placed in the form of a snap-hook for sale. This state of facts brings the case within the principle which is stated in Sargent *v.* Yale Lock Manufacturing Co., 17 Blatchford C. C. R., 244, and which is that when reduction of prices in the plaintiffs' sales is the only element of damage, if the essential feature of the plaintiffs' structure and of the infringing structure respectively is the patented device, and the patented device, being only a part of the structure, must necessarily be embodied in the complete structure for sale, and he is enabled by the presence of such patented device to make his profit on the entire structure, and he is deprived, by the acts of the defendant in selling at low prices infringing structures containing the patented device, of the profit which he otherwise would have made on the structures containing the patented device which he actually sold, "it seems plain that the defendants' infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices, after allowing a proper sum for any other patented device contained in the defendants'" structures "and for any other cause which gave to the defendant an advantage in selling his" structures.

Each of the various kinds of snap books had its share of the trade. The plaintiffs' article had its share of success and their prices were not interfered with until the defendants appeared with their snap-hook which contained the plaintiffs' distinctive feature. In this state of facts, the plaintiffs affirmatively claimed that the reduction was owing

It is to be noticed that the damages which are found in favor of the plaintiffs result only from an enforced reduction in prices. The plaintiffs have been manufacturing their hook since 1865. Judd & Blakeslee and the Middletown Tool Co., or its successor, have been their competitors in snap hooks since that date, while the snap hooks No. 1 and 2 of O. B North & Co, have competed with their article for twelve and ten years respectively. No one of these hooks ever affected the plaintiffs' prices. The same is true of the Mosher and Anchor hook, and it may be remarked that there was no evidence of importance upon the part of the defendants tending to show that these other competing snap hooks had an effect in the reduction of prices. The defendants claimed that the O B North & Co. hook was both a competitor and a plain infringer and that therefore, it was unjust to visit upon them all the consequences of the infringement. It is immaterial to the issues of this case whether this snap hook is or is not an infringement of the plaintiffs' patent if it has not reduced their prices. If it has not injured the plaintiffs in this regard, its presence in the market does not lighten the burden of the defendants.

The next and important exception relates to the fact that the master made no apportionment of the reduction in price between the patented and the unpatented parts of the snap-hook.

A harness snap-hook of the general class to which the plaintiffs' article belongs is a little device consisting of a hook and a tongue so actuated by a torsional spring that the hook is prevented from disengagement from the ring to which it may be attached. A hook is of course a necessary part of the device, but the hook part of the various snap-hooks is substantially the same. The difference between the different kinds of harness snap-hooks consists substantially in the methods in which the tongue and spring are constructed and arranged with reference to each other and thus the springing tongue, by which is meant the tongue with the spring, is the distinctive or characteristic part of the device. It is not merely the essential feature of the plaintiffs' hook, but it is the essential feature of all snap-hooks of this class. I do not mean by "essential" that it is the only important part of the completed article, but I mean that it is the part in which consists and which makes the difference in the value of different kinds of snap-hooks as marketable articles. The essential and characteristic feature of the plaintiffs' and defendants' snap-hooks is a swinging tongue with a side recess and the feature makes the article what it has been in the market.

This statement of the nature of the device shows that the principle which is involved by the defendants and which is perfectly true when applied to a certain state of facts, is not applicable to the facts in this case, the principle being that, when the patented thing is a mere improvement in a part of a device, the proof of damages resulting from an infringement must be limited accordingly. The plaintiffs' snap-

hook is an improvement upon the Judd and other snap-hooks, in that it is a new and better way of constructing and arranging the same tongue and the same spring and therefore the defendants say that the damage must be limited to those which result from the improper use of the plaintiffs' improvement upon the Judd hook. But the Bristol snap-hook is not a mere improvement upon the Judd hook. The Judd device has a tongue and a spring made and arranged in a way of its own, which method makes the article as a marketable article. The plaintiffs' snap-hook has its tongue and its spring made and arranged in a certain other way which gives to the device its value as a finished article in the market. But the defendants further say that the device is composed of an unpatented hook and a swinging tongue, and that the enforced reduction in price was fully as much upon the hook as upon the tongue, whereas the master gave the entire reduction as damages, when it was the duty of the plaintiffs to prove and of the master to find, if a sufficient basis was furnished for the finding, how much of the damage was due to the infringement of the patented part. While it is not true that the tongue is the whole of the device or that the hook is not an indispensable part of it, yet the tongue is the peculiar and variable and, as has been said, essential feature in all snap-hooks of this class, and the hook is the unvarying feature to which the tongue is attached. Both together constitute a snap-hook and the patented tongue must, in connection with an unpatented hook, be placed in the form of a snap-hook for sale. This state of facts brings the case within the principle which is stated in Sargent *v.* Yale Lock Manufacturing Co., 17 Blatchford C. C. R., 244, and which is that when reduction of prices in the plaintiffs' sales is the only element of damage, if the essential feature of the plaintiffs' structure and of the infringing structure respectively is the patented device, and the patented device, being only a part of the structure, must necessarily be embodied in the complete structure for sale, and he is enabled by the presence of such patented device to make his profit on the entire structure, and he is deprived, by the acts of the defendant in selling at low prices infringing structures containing the patented device, of the profit which he otherwise would have made on the structures containing the patented device which he actually sold, "it seems plain that the defendants' infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices, after allowing a proper sum for any other patented device contained in the defendants'" structures "and for any other cause which gave to the defendant an advantage in selling his" structures.

Each of the various kinds of snap books had its share of the trade. The plaintiffs' article had its share of success and their prices were not interfered with until the defendants appeared with their snap-hook which contained the plaintiffs' distinctive feature. In this state of facts, the plaintiffs affirmatively claimed that the reduction was owing

entirely to the infringement, and also deny that it was attributable in any respect to any of the causes which were suggested by the defendants. It has occurred to me that the reduction might have been owing in part to the commercial success and enterprise in pushing their goods upon the market and effecting sales where the plaintiffs could not, but no exception was taken to the master's report on this ground, and the suggestion was not made before him, and I do not suppose that the principle that the plaintiffs must affirmatively show by satisfactory evidence, how much of the damage was attributable to the infringement, means that, after he has proved that the infringement was the sufficient operative cause of the entire damage and has refuted all the suggestions of contributory causes which the defendant made, he must disprove the existence of all its possible causes which might have existed, but which it was not suggested ever did exist.

It will be seen from the foregoing quotations that the court below found three things established, to wit:

*First.* That there was reduction in the price of complainants' goods practically cotemporaneous with the introduction to the market of defendants' snap.

*Second.* That the reduction in complainants' prices was wholly caused by defendants' competition.

*Third.* That the whole market value of complainants' snap was due to the presence therein of the feature patented in and by the first claim of complainants' patent.

THE LAW.

*Seymour* v. *McCormick*, 16 Howard, 480, Supreme Court.

Excerpt:

"Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee 'would have made, if the infringer had not interfered with his rights, is a question of fact and not a judgment of law.' The question is not what, speculatively, he may have lost, but what he actually did lose. It is not a 'judgment of law,' or necessary legal inference, that if all the manufacturers of steam engines and locomotives who have built and sold engines with a patented cut-off, or steam-whistle, had not made such engines, that therefore all the purchasers of engines would have employed the patentee of the cut-off, or whistle; and that, consequently, such patentee is entitled to all the profits made in the manufacture of such

steam engines by those who may have used his improvement without his license. Such a rule of damages would be better entitled to the epithet of 'speculative,' 'imaginary,' or 'fanciful,' than that of 'actual.' If the measure of damages be the same, whether a patent be for an entire machine, or for some improvement in some part of it, then it follows that each one who has patented an improvement in any portion of a steam engine or other complex machine, may recover the whole profits arising from the skill, labor, material and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his whole profits to each of a dozen or more several inventors of some small improvement in the engine he has built. By this doctrine even the smallest part is made equal to the whole, and 'actual damages' to the plaintiff may be converted into an unlimited series of penalties on the defendant."

*New York* v. *Ransom*, 23 Howard, 487, Supreme Court, 1859.

The above case of *Seymour* v. *McCormick* was quoted and followed.

*Philp* v. *Knock*, 17 Wallace, 460, Sup. Ct., 1873.

Excerpt:

"The measure of the damages to be recovered against infringers, prescribed by the act of 1836, as well as by the act of 1870, is the actual damages sustained by the plaintiff. * * * In arriving at these conclusions the profit made by the defendant and that lost by the plaintiff, are among the elements which the jury may consider. When the infringement is confined to a part of the thing sold, the recovery must be limited accordingly. It cannot be as if the entire thing were covered by the patent."

*Buerk* v. *Imhaeuser*, 10 O. G., 907, Johnson, 1876.

In this case the master, after computing the defendant's profits, arrived at the complainant's damages by multiplying the complainant's net profit on a single watch by the number of infringing watches sold by the defendant. The court in rejecting the master's report said: "It is only actual damages which are proved to have been sustained by the complainant that he can in any event recover. It is not enough that he may have suffered loss, for he cannot have compensation for conjectural losses; the losses must be proved and not guessed at."

"It was not made to appear that the plaintiff could have sold his watches to the persons who purchased from the defendants. * *

* The damages in such a case must be confined to the direct and immediate consequences of the infringement, and not embrace those which are both remote and conjectural. * * * There is another

error involved in this assessment of damages, and that is that the estimated profit of the patentee embraces not only that derived from the sale of the patent privilege, but also the whole manufacturer's profits upon the materials and workmanship of the whole article. * * * In cases where the patent is for a distinct improvement, separable from the rest of the article, as in the case put by the plaintiffs' counsel of a wagon with a patent pole, the rule is admitted and settled. * * * The same principle is, I think, applicable to a case of this kind. The watch is open to the manufacture of every one, and it is common to both the plaintiffs' patented article and to the infringing article of the defendant. The wrong which the case shows the plaintiff to have sustained is the use of his invention in the making by the defendants of the infringing watches. They have taken his invention and used it in making the infringing watches; and it is the value of that use, the right to which belonged to the plaintiff, that they have appropriated to themselves. For this the plaintiff is entitled to recover in damages; but this rule has been disregarded and the case does not furnish any evidence which can either support the actual finding or form the basis for a correction in this respect by the court. The burden in this respect was upon the plaintiff."

*Ingersoll* v. *Musgrove*, 13 O. G., 966, Blatchford, 1878.

Excerpt:

"The plaintiff sold during the same time 90,554 of the patented cuspadores for a sum less by $10,325.84 than the sum for which they would have sold at rates which ruled prior to the commencement of the infringements. The master reports that such reduction in price was to a great extent occasioned by such infringements by the defendants and other parties; that the infringements by the defendants occasioned a loss to the plaintiff by the compulsory reduction of his prices of thirty per cent. of the $10,325 84, being $3,097.76; that such loss was occasioned by reason of the fact that the infringing articles contained the patented features of the plaintiff's patented cuspadores; and that one half of such thirty per cent. of loss was occasioned by each set of defendants.

* * * * *

The question whether the prices which the plaintiff received for his cuspadores were less than those which he would have received but for the infringements by the defendants is a question of fact. Such also is the question as to the amount of the reduction, and as to how much of it was occasioned by the acts of the defendants; and as to how much of it was attributable to the fact that the infringing articles contained the patented feature of the plaintiff's patented cuspadores.

* * * * *

It is for the plaintiff to establish by satisfactory evidence, not only that a reduction of his prices was caused by the infringements, but how much such reduction was; and how much of it was occasioned by the acts of the defendants; and how much was due to the fact that the infringing articles contained the patented feature of the plaintiff's patented cuspadores.

* * * * *

I am not satisfied with the conclusions of the master on this subject. The evidence on which those conclusions were reached was in the shape of estimate, and conjecture, and opinion, and afforded no proper basis for a report of actual damages by a forced reduction of prices. The allotment of thirty per cent. of such reduction to the infringements by the defendants, and to the fact that the infringing articles contained the patented features of the plaintiff's patented cuspadores, and of seventy per cent. of such reduction to other causes, is founded only on the conjectures, estimates, and assertions of witnesses, and not on any sound and safe basis of calculation.

* * * * *

Only nominal damages should have been reported in each case."

*Garretson* v. *Clark*, 14 O. G., 485, Blatchford, 1878.

Excerpt:

"The argument on the part of the plaintiff is that at the time that the defendants began to infringe, the plaintiff's mop and the mop of one Taylor held a monopoly of the market, and were not competed with seriously by other mops, or to an extent which interfered with an arrangement which had been made between the proprietors of the patents covering the plaintiff's mop and the proprietors of the patent covering the Taylor mop, whereby the price of these two mops was maintained at two dollars a dozen, affording a profit of at least one dollar a dozen; that the defendants sold the infringing mop at one seventy-five cents a dozen; that the plaintiff had an establishment at which he could have made mops enough to fill all ordinary orders for mops; that his mop was known and his trade established; that the effect of the infringment was to cause a large falling off in the plaintiff's sales; that it was the taking without right of the plaintiff's patented improvement which enabled the defendants to enter the mop market, because the plaintiff's mop and the Taylor mop had substantially driven out of the market all other mops, by making it impossible to sell such other mops at a profit; that while it is generally true that the patentee of an improvement in an article is not entitled to the profits on the sale on the whole article, the use is otherwise when as a matter of fact the improvement so dominates and controls the article in the market held as an exclusive monopoly by the patentee that the only way in which the article can be sold at all at

a profit is through the sale of it with the patented improvement; that the advantage which the defendants gained was a market for mops at a large profit, when there was no other form of mop open to the public by which they could have obtained any considerable sales at a profit, and that the only way to reach a result consonant with the substantial justice of this case is to regard the mop as an article of commerce under the operation of laws whereby an improved article will supersede and displace an unimproved one, destroying the possibility of producing it at a profit, and thus driving it out of existence, so that the superior article, by virtue of its superiority, dominates the market until it in turn gives way in progress of new improvements in its kind.

It is a weak point in the argument for the plaintiff that it assumes, without sufficient evidence, that the market for the plaintiff's mop was made solely by the fact that the mop contained the improvements patented by the plaintiff's patents This would not follow even from the fact that the mop with such improvements had driven other mops out of the market. Energy, dilligence, business tact, superiority, facilities and skill, and fortuitous circumstances, contribute largely to the success in the market even of an article which has all the superiority in its line that is claimed for the plaintiff's mop. In the present case there was an especial element, entirely outside of the plaintiff's patents, which made the manufacture and sale of the plaintiff's mop profitable, and that was the combination with the owners of the Taylor patent, under which the price of both mops was fixed at two dollars a dozen.

The argument on the part of the plaintiff leads to the conclusion that when an article or a machine with a given patented improvement embodied in it has a controling preference in the market over the article or machine which does not embody such improvements, it must be conclusively inferred that such preference is due to the improvement, and that the patentee, in case of infringement, is entitled to the profits made by the infringer from the manufacture and sale of an equal number of entire articles or machines with the number of entire articles or machines made and sold by the infringer. This would often cause a small improvement on a costly machine to draw to itself very large profits, entirely out of proportion to the relation existing between the improvement and the rest of the machine, and in cases where the unpatented parts of the machine were quite as indispensable to the machine as the patented improvement, and even more indispensable. The profit on the entire machine would virtually become the licensee fee for the use of the patented improvement. In the case of a machine embodying several patented improvements, an infringement of several patents belonging to several different persons, each patentee would claim that it was his particular patented improvement which caused the machine to dominate

the market, and each would claim the profits of the manufacture and sale of the entire machine and damages based on the same principle. The patentee must, in every case, give evidence tending to separate or apportion the defendants' profits, and the patentee's damage between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and the damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature. In the present case the master reports that the plaintiff has failed to give such evidence, and I concur with the master in his conclusions.

The plaintiff's exceptions to the master's report are all of them overruled.

Those which relate to the admission of testimony objected to by the plaintiff (conceding that such objections can be availed of by exceptions to the master's report,) become immaterial in view of the fact that because the plaintiff failed to give adequate evidence as to profits and damages the defendants were not put upon their defense in that respect, and it is unimportant whether they give competent evidence or no evidence. If the evidence objected to is all stricken out the defendants are protected by the plaintiff's failure; they are not called upon to report until the plaintiff has made a case. (Black *v.* Munson, in this court, per Hunt, J., June 19, 1877.)"

*Schillenger* v. *Gunther*, 14 O. G., 713, Blatchford, 1878.

Excerpt:

"The master also reports that the complainant is entitled to recover from the defendants a further sum as special damage, on account of the laying of the pavement for Andrew Dold, which pavement was laid in the same manner as the city hall pavement, above referred to, the proofs showing that said pavement was contracted for and laid by the defendant in October, 1876, but is not included in any of the accounts tendered by him, and that it is shown that the complainant gave to Dold a bid or estimate for the said work, and that he was underbid by the defendant, and thus damaged to the amount of $900. Exception 21 excepts to the report because it finds that the complainant is entitled to recover from the defendant special damages on account of the laying of the pavement for Andrew Dold, and that the proofs show that said pavement was laid in the same manner as the city hall pavement. So much of exception 21 as excepts to the report of the $900, as special damage, is allowed. Exception 22, before cited, is broad enough to be an exception to the report of the $900, as damages. The remarks before made as to the allowance of profits, apply to this $900. If entitled, in any event, to any allow-

ance of damages in respect to the Dold pavement, the plaintiff must show the value of the patented invention, as distinct from the value of the rest of the Dold pavement, and can in no event recover as damages the entire $900."

*Sargent* v. *Yale Lock Mfg. Co.*, 17 O. G., 106, Blatchford, 1879. Excerpt:

"The plaintiff excepts to the finding of the master that the testimony of the witnesses, Munger and Cady, does not form a basis upon which the master can make a computation of the money value of the device which the defendant should pay to the plaintiff, for the reason that the estimate and opinion of experts is competent evidence of value in cases like the present. The plaintiff also excepts in that the master * * does not take into consideration not only the same circumstance but the opinions of the witnesses, Munger and Cady, and the other circumstantial evidence in the case relating to the requirements of the market, the effect of the plaintiff's picking of the defendant's lock, the impossibility of substituting any other device except the patented device, to serve the same purpose, during the period when said patented device was used by the defendant, and all the other evidence introduced by the plaintiff.

* * * * *

I think the master was right in rejecting the estimate of the witness, Munger, and the general evidence of the witness, Cady."

*Garretson* v. *Clark*, 4 Sup. Ct. Rep., 291, Sup. Ct., 1884.

This is the mop-head patent involved in the case of the same name decided on the circuit by his Honor, Judge Blatchford, as above. The Supreme Court confirmed the decision of the court below, awarding only nominal damages, and said:

"The patent was for an improvement in the construction of mop-heads, which may be described with sufficient accuracy as an improvement in the method of moving and securing in place the movable jam or clamp of a mop-head. With the exception of this mode of clamping, mop-heads like the plaintiff's had been in use time out of mind. * * When a patent is for an improvement and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: 'The patentee' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the

patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.' The plaintiff complied with neither part of this rule. He produced no evidence to apportion the profits or damages between the improvement constituting the patented feature and the other features of the mop. His evidence went only to show the cost of the whole mop, and the price at which it was sold. And, of course, it could not be pretended that the entire value of the mop-head was attributable to the feature patented."

Certain principles may be taken to be settled by these decisions. Among them are:

*First.* It cannot be *presumed* that a decrease in complainants' sales is caused by defendants' competition. And no evidence in the nature of conjecture, estimate or opinion is competent evidence in this regard. Complainants must furnish actual *proof.*

*Second.* It cannot be *presumed* that those who purchased goods from defendants would have purchased the same goods from complainants if defendants had not been in the market. And no evidence in the nature of conjecture, estimate or opinion is competent evidence in this regard. Complainants must furnish actual *proof.*

*Third.* Where the patented thing is a mere improvement in a part of a device, the proof of the resulting damages must be limited to that part, and complainants must furnish actual proof—not conjecture, estimate or opinion—to properly apportion the damages;

or,

Complainants must show by proof—not conjecture, estimate or opinion—that the whole marketable value of complainants' patented article is due to the patented improvement.

AS TO EACH ONE OF THESE PROPOSITIONS THE BURDEN OF PROOF IS ON THE COMPLAINANTS.

As already remarked, the court below found three things established, to wit:

*First.* That there was a reduction in the price of complainants' goods practically co-temporaneous with the introduction to the market of defendants' snap.

*Second.* That the reduction in complainants' prices was wholly caused by defendants' competition.

*Third.* That the whole market value of complainants' snap was due to the presence thereon of the feature patented in and by the first claim of complainants' patent.

Defendants contend that these findings are not warranted by the evidence.

A. A GENUINE DECREASE IN COMPLAINANTS' SALES IS NOT SATISFACTORILY ESTABLISHED. Mr. E. T. Fitch testifies, before the Master, (Int. 10, page 53 of record), that the number of gross of the patented Bristol snaps sold by complainants during 1879, was 9,695 gross. He testifies (Int. 11) that the number of gross sold during 1880 was 6,914 gross. Defendants' so called competition began in October, 1879, (Bragg's testimony, before the Master, Int. 11, page 41 of record). Complainants reduced their prices in December, 1880. (Fitch's testimony before the Master, Int. 2, page 53 of record). As appears by Mr. Fitch's testimony, complainants' sales in 1880, fell off 2,781 gross, as compared with their sales in 1879. But there is no evidence that complainants' sales in 1879 were not abnormally high. There is evidence showing that they were. Mr. E. T. Fitch, testifying on the merits of the case, December 23, 1880, (Ints. 3 and 4, page 14 of record,) gave the number of patented snaps sold by complainants from the date of the patent in suit to that date, December 23, 1880, as thirteen millions. An examination of E. T. Fitch's answer to ×-Int. 117, (pages 63, 64 of record), in the evidence before the Master, discloses the fact that between October 1, 1879, and December 23, 1880, complainants made and sold 1,395,792 of these snaps, which taken from said total of thirteen millions leaves 11,604,208 snaps made and sold by complainants since the date of the patent, May 16, 1865, and prior to the beginning of defendants' competition, October 1, 1879, a period comprising 187 months, giving an average monthly sale of 62,054.

A further examination of Mr. Fitch's answer to said ×-Int. 117,

shows that between October 1, 1879, and December 1, 1880, complainants sold 1,316,592 of these snaps, giving an average monthly sale of 94,042, which exceeds the prior average monthly sales by fifty per cent.

This evidence is conclusive to show that as compared with the *general course* of complainants' business prior to the beginning of defendants' competition, there was no actual decrease in complainants' sales during that competition. The said evidence further goes to show that complainants' sales of 9,695 gross of snaps in 1879 was abnormally high; and that the sales of 1879 standing alone furnish no proper standard of comparison in an endeavor to ascertain whether there was in 1880 a falling off of complainants' sales as compared with the regular and normal amount of their prior business.

B. DEFENDANTS' SALES WERE CLEARLY NOT THE WHOLE CAUSE OF THE DECREASE IN COMPLAINANTS' SALES. In E. T. Fitch's testimony before the Master, (Int. 10, page 53 of record), he says that complainants sold 9,695 gross of snaps in 1879, and (in Int. 11, same page) he says that they only sold 6,914 gross in 1880, making a decrease in 1880, as compared with 1879, of 2,781 gross. If defendants' sales of snaps were the whole cause of this decrease, clearly defendants must have sold the same number of infringing snaps in 1880, to the very customers that have bought of complainants in 1879. Defendants' Exhibit List of Sales (page 94 of record) gives every sale of snaps made by defendants between October 20, 1879, (when they commenced selling snaps) and September 21, 1881, (when they stopped selling snaps); this exhibit not only give the *infringing* snaps, but *all* the snaps, of *all kinds* made and sold by defendants. Of course it gives each separate sale for the year 1880. The amount thereof is 2,118 gross, falling short of complainants' decrease of 2,781 gross by the amount of 663 gross, or 95,472 snaps. These sales of 2,118 gross of snaps by defendants in 1880, include not only infringing snaps, but others in quantity as well. For A. N. Bragg testifies (Ints. 3, 4, 5, 6, pages 50, 51 of record) that more than one-sixth of defendants' snaps had no side recess. But if *all* these snaps of defendants be considered as infringing snaps, it is still perfectly evident that this decrease of sales in 1880 was not wholly attributable to defendants' competition. There is at least an unexplained void of 95,472 snaps.

It appears by Mr. Fitch's testimony before the Master (Ints. 25, 26, page 55 of record), that of the ninety different concerns to whom defendants sold snaps, first and last, one-third thereof were never customers of complainants. It is a reasonable inference from this testimony of Mr. Fitch that one-third of defendants' snaps sold in 1880, were sold to parties who were never customers of complainants. Defendants' sales of snaps of all kinds in 1880 were 2,118 gross; one-third of this is 706 gross, which, as we have just seen, may be reasonably inferred to have been sold to parties who were never customers of complainants thereby reducing the number of defendants' snaps which reasonably might be estimated to have been sold to complainants' customers in 1880 to 1,412 gross, which is only about one-half of complainants' decrease of 2,781 gross in 1880. From this it clearly appears that the decrease in complainants' sales in 1880 was not wholly, nor in the major part, attributable to competing sales made by defendants.

C. THE CIRCUIT COURT BASES ITS FINDING ON THE OPINION OF ONE MAN. That man is E. T. Fitch, the one man of all the world whose opinion is likely to be prejudiced by self-interest. He testifies that complainants, in 1880, found their sales decreasing; they attributed that decrease to defendants' competition, and therefore lowered their prices. It may be admitted that complainants' sales were 2,781 gross less in 1880 than they were in 1879. It may also be admitted that in 1880 defendants sold 1,412 gross of snaps to parties who were or had been the customers of complainants. It does not follow by any logical process whatever that complainants' decrease in sales in 1880 was attributable in whole or in any substantial part to the competition of the defendants. Other causes are entirely competent to account for the whole of it. Let us support our statement as to this finding of the court below being based upon Mr. Fitch's *opinion* by evidence:

*Fitch's testimony before the Master* [*page* 53, *record*]:

Int. 8. What was the cause of this change in the rate of discount?
Ans. Competition of the infringing snaps made by the defendants.
Int. 9. Was there any other cause within your knowledge for making the change?
Ans. There was not.

[*Page* 56, *record.*] Cross-examination.

×-Int. 42. In your 8th and 9th answers you say that you lowered the prices of your snaps because of the competition of infringing snaps by the defendants. You mean, do you not, that complainants lowered the prices of their snaps because they found their sales decreasing, and they attributed that decrease to defendants' competition?

Ans. I do.

This is an explicit admission on the part of the principal complainant in this suit that to attribute complainants' decrease to defendants' competition is to base it upon *opinion* merely. Now no part of the rule of damages in patent causes is better settled than that conjecture, estimate and opinion is not competent evidence to prove such a point, because—

*First.* Complainants do not attempt to say that each one of their said previous customers was not also a previous customer of the other manufacturers of snaps having swinging tongues.

*Fitch's testimony* [*page* 61, *record*]:

×-Int. 87. How many, to your knowledge, of the fifty-nine firms mentioned in your 18th answer, or of the sixty-three firms mentioned in your 26th answer, did not also buy snap hooks with swinging tongues of other manufacturers than you, prior to the time that defendants' competition began?

Ans. I have no knowledge concerning it.

*Second.* Complainants do not attempt to say that each and all of complainants' said previous customers did not, during the period covered by the accounting, buy their snaps, having swinging tongues, of other manufacturers than complainants or defendants, so that it is quite as likely that the competition of such other manufacturers was the chief factor in decreasing complainants' sales as it is that defendants' competition had any such effect.

*Fitch's testimony* [*page* 61, *record*]:

×-Ins. 88. How many, to your knowledge, of the fifty nine firms mentioned in your 18 answer, or of the sixty-three firms mentioned in your 26 answer, did not, during the period covered by the accounting, buy snap hooks with swinging tongues of other manufacturers than you and the defendants?

Ans. I don't know.

*Third.* Complainants do not attempt to say that they did not during the period covered by the accounting, sell to each of their said previous customers as many or even more of the patented snaps than complainants had previously sold to these same customers.

*Fitch's testimony* [*page 61, record*] :

×-Int. 89. To how many of the fifty-nine firms mentioned in your 18 answer, or of the sixty-three firms mentioned in your 26 answer, did you sell snap hooks with swinging tongues having recess in the side, after October, '79, and before September 20, '81?

Ans. It is safe to say that we sold to all.

Now with complainants practically admitting that they have not lost the sale of a single snap through sales by defendants to parties whom they claim as their previous customers, Mr. Fitch's expression of *opinion* that complainants' decrease in sales was wholly attributable to defendants' competition, vanishes into thin air.

It fully appears from all of Mr. Fitch's testimony (Int. 23, page 55, record,) that he has carefully examined complainants' books for the purpose of giving such evidence therefrom as will tend to sustain the claim that is now made. It is an irresistible inference that if complainants' books showed that during the time of defendants' competition complainants' sales fell off as regards the parties to whom defendants sold, and who were also the previous customers of complainants, Mr. Fitch would have been very sure to have produced just that evidence. The fact that complainants produced no such evidence even after their attention was pointedly directed to it by the cross-examination last quoted, is practically conclusive evidence that defendants' competition had nothing whatever to do with decreasing complainants' sales in 1880.

D. COMPLAINANTS' NEW SNAP OF 1880 MUST HAVE HAD AN INFLUENCE IN DECREASING COMPLAINANTS' SALES. Complainants put upon the market a new form of snap in the first part of July, 1880, attempting to substitute it for the established article. Complainants reduced their prices in December, 1880. It can not be otherwise than that the attempt to introduce this new form of snap, and to substitute it for the old form in the trade, must have had an influence in decreasing their sales.

*Fitch's testimony before the Master* [*page 62, record*] :

×-Int. 97. Were not your decreased sales due, in some measure at least, to the fact that you were attempting to introduce a new form of snap into the market?

Ans. I do not think so.

×-Int. 98. It is a fact, is it not, that W. & E. T. Fitch have been making and selling a snap having such a tongue, and spring, and body as that I hold in my hand?

Ans. It is.

(The same is offered in evidence, and marked Defendants' Exhibit "New Snap.")

×-Int. 99. Have you included in the figures given by you in answer to 94 and 95 interrogatories the snap hooks made and sold by W. & E. T. Fitch, the same in construction as Defendants' Exhibit "New Snap"?

Ans. I have.

×-Int. 100. Can you tell how many like Defendants' Exhibit "New Snap" you have made and sold in the period covered by defendants' accounting?

Ans. I cannot at present.

(Defendants' counsel requests the witness to give, at the next convenient hearing, the number of snaps made and sold by W & E. T. Fitch like Defendants' Exhibit "New Snap," from Oct., '79, up to Feb., 1882, separating the number for each calendar year.)

By this table, defendants' exhibit Sales of New Snaps, which will be found printed on page 96 of the record, it will be seen that this new form of snap was practically put upon the market in August, 1880. The decrease in price was made in December, 1880. The one thing follows upon the heels of the other with the sequence of cause and effect. Common sense and all experience teaches that to attempt to substitute for a well-known and time-tried article of trade, an unknown and untried article, must certainly have the effect to decrease sales.

*Fitch's testimony before the Master* [*page 62, record*]:

×-Int. 104. When did you begin to put snaps like Defendants' Exhibit "New Snap" on the market?

Ans. If my recollection serves me, it was in August or September, 1880.

× Int. 105. And that was the very year you experienced your first decrease in sales of snaps, was it not?

Ans. It was the year.

E. COMPLAINANTS' DECREASE IN SALES MUST HAVE BEEN DUE IN PART TO A PREVIOUS INCREASE IN PRICES.

*Fitch's testimony before the Master* [*page 62, record*]:

×-Int. 106. For the year preceding October, 1879, what were your prices and discounts on these Bristol snaps?

Ans. I think from—I should say that they were 50 per cent. and ten up to October, 1879, for ten months.

×-Int. 107. You raised from 50 per cent. 10 per cent. 10 in October, '79, up to 50 and 10 did you not?

Ans. We did.

×-Int. 110. Is it not a fact that in 1880, when your sales fell off, you were trying to sell your snaps at a greater price than you were prior to October 20, 1879!

Ans. The price had been advanced.

If an increase in the price of an article does not tend to decrease the sales of that article, then all political economists who have ever written are mistaken on what they and all the world put as an elementary principle.

F. DEFENDANTS' SNAP WAS ONLY ONE OF EIGHT SNAPS COMPETING WITH COMPLAINANTS'. IT IS UNREASONABLE TO ATTRIBUTE THE EFFECT OF THE ENTIRE COMPETITION TO DEFENDANTS' COMPARATIVELY SMALL SALES. These other competing snaps were—

Defendants' Exhibit Old Snap.
Defendants' Exhibit Judd & Blakeslee Snap.
Defendants' Exhibit Middletown Snap.
Defendants' Exhibit Anchor Snap.
Defendants' Exhibit Mosher Snap.
Defendants' Exhibit O. B. North & Co.'s Snap.
Defendants' Exhibit O. B. North & Co.'s Snap No. 2.

All these had swinging tongues. All but one had a torsional spring resting in a recess in the rear end of the tongue. One of them, the O. B. North & Co. snap, had the side recess, and is a clear infringement.

*Fitch's testimony before the Master* [*page 56, record*] :

×-Int. 43. During all the time that defendants were selling snaps having a side recess in a swinging tongue, various other manufacturers, aside from complainants and defendants, were making and selling snaps with swinging tongues in the same markets of the United States with you, were they not?

Ans. They were.

×-Int. 44. Will you give the names and locations of such of them as you can now remember?

Ans. Judd & Blakeslee, of New Britain, Conn., successors to Middletown Tool Co., of Middletown. I do not recall any others.

×-Int. 45. Were not the Anchor Snap Co., of Northfield, Conn., so doing?

Ans. Not to my knowledge.

×-Int. 46. Has not your company written that concern complaining of infringing of the Bristol patent?

Ans. We have some years since.

×-Int. 47. Did they ever desist or hold up in any manner?

Ans. I supposed they did.

×-Int 48. Is it not within your knowledge that the Anchor Snap Co. were putting snaps with swinging tongues in the market during the time that defendants were making and selling snaps with swinging tongues having a side recess?

Ans. Yes.

X-Int. 49. The Judd & Blakeslee concern were and are very heavy manufacturers of snaps, were and are they not?

Ans. I do not know.

X-Int. 50. Did George D. Mosher, of Birmingham, Conn., make and put snaps on the market during the period covered by the accounting?

Ans. I do not know that George D. Mosher did.

X-Int. 51. Was there a concern at Birmingham that did?

Ans. I have understood so.

X-Int. 54. The snap put in evidence as Complainants' Exhibit "Old Snap," is one of the Judd & Blakeslee make is it not?

Ans. I so understand it.

X-Int. 55. Can you identify the snap I hold in my hand as a kind of snap made and sold by the Anchor Snap Co. during the period covered by the accounting?

Ans. I think it is similar.

(Snap referred to is offered in evidence and marked "Anchor Snap."

X-Int. 56. Can you identify the snap I hold in my hand as the snap made and sold by the Birmingham concern during the period covered by the accounting?

Ans. I have never seen a snap like that before and cannot identify it.

(Snap put in and marked "Mosher Snap.")

X-Int. 57. Do you not know of still another concern that made and sold snaps with swinging tongues during the period covered by the accounting?

Ans. I do not. If the question refers to a snap with a coiled spring.

X-Int. 58. These snaps referred to as made by Judd & Blakeslee, by the successors of the Middletown Tool Co., by the Anchor Snap Co., and by the Birmingham concern, all had coiled or torsional springs, did they not?

Ans. The first, or Judd & Blakeslee, had. The second, or Middletown Tool Co., as I remember it, had not. The third, the Anchor Snap, had. The fourth, the Birmingham snap, I know nothing of, by that designation.

X-Int. 61. Do you recognize the snap I hold in my hand as made by O. B. North & Co.?

Ans. I recognize it as similar to snaps made by O. B. North & Co.

(Put in evidence and marked as the "O. B. North & Co. Snap.")

X-Int. 66. The O. B. North & Co. snap has a recess in the side of the tongue, opening outward, combined with a coiled spring, which rests in such a recess and operates the body of the hook and the tongue, has it not?

(Objected to, first, because the exhibit speaks for itself; and second, because it appears that the exhibit represents a style of hook sold in the market years before the period covered by the accounting.)

Ans. This exhibit snap has.

X-Int. 69. And do you also desire to be understood that you do not know of such a snap as the O. B. North & Co. snap appearing on the market in the last ten years as the make of O. B. North & Co.?

Ans. No, sir.

X-Int. 70. How late did such a snap appear on the market to your knowledge?

Ans. I can't say.

X-Int. 71. Did it appear as late as the period covered by the accounting?

Ans. I have no definite knowledge concerning it.

Int. 73. Can you say that such a snap did not appear on the market, such as made by O. B. North & Co., during the period covered by the accounting?

Ans. I cannot.

X-Int. 74. Can you say from your own knowledge that the sales of the snaps with swinging tongues, made and sold by manufacturers other than defendants, did not have something to do with decreasing your sales of snaps as you have testified?

Ans. I cannot.

*Bragg's testimony before the Master.* (page 67, record):

Int. 1. Will you state what snaps, if any, with swinging tongues appeared on the market during the period covered by the accounting?

Ans. All those that have been exhibited in court, besides a number of others that have not been produced here.

Int. 2. Will you give the names of such of them as are found, stating the manufacturer and the place of manufacture?

Ans. I identify the snap marked "Mosher Snap," as an article made and sold by George D. Mosher, Birmingham, Conn.

Judd & Blakeslee snap, known to the trade as Kempshall & Nash patent, manufactured and sold by Judd & Blakeslee, New Britain, Conn.

Snap marked Middletown snap, manufactured and sold by the Middletown Tool Co., and their successor, Middletown, Conn.

That marked "Anchor Snap," manufactured and sold by the Anchor Snap Co., Northfield, Conn.

Snap marked O. B. North & Co's. snap No. 2, manufactured and sold by O. B. North & Co., New Haven, Conn.

Snap marked Defendants' Snap, manufactured and sold by A. N. Bragg & Co., Pine Meadow, Conn.

Snap marked O. B. North & Co's. snap, manufactured and sold by O. B North & Co. New Haven, Conn.

Snap marked Defendants' Exhibit New Snap, manufactured and sold by W & E. T. Fitch, New Haven.

Int. 3. Did snaps the same as Complaints' Exhibit "Old Snap," used at the trial of this case on the merits, appear on the market during the period covered by the accounting, and if they did, by whom and where were they sold?

Ans. Such snaps appeared, and they were made and sold by Judd & Blakeslee, New Britain, Conn.

Int. 5. Has not the O. B. North & Co. snap a tongue constructed with a recess in the side, opening outward, combined with a coiled spring that rests in such recess and operates between the body of the hook and tongue?

Ans. It has.

Int. 6. Has it not also a trigger for operating the tongue described in C. B. Bristol's patent, May 16, 1865?

Ans. It has.

Int. 7. Does the trade, or do consumers or users of snaps, make any inquiry or distinction as to the manner of hanging the tongue in those snaps having a swinging tongue?

Ans. They do not, except that they do not consider a snap with a detachable rivet as similar to one that has not.

Int. 15. Can you and will you state whether the different kinds of snaps with swinging tongues were sold, in the market, during the period covered by the accounting in one

general competition, or whether there was any special competition between complainants' snap and yours?

Ans. We understood and so now understand that all the snaps were in the same competition, and have never understood that the competition between us and the so-called Bristol snap was any more marked than the other named styles that have been produced here.

The court below, in passing upon this point, finds, in substance, that the competition of these other snaps than defendants, had no effect in decreasing complainant's sales during the time that defendants were in the competition, for the reason, as given by the court, that the competition of these seven other snaps was a settled matter which had existed for several years. The court below is mistaken as to the fact; the Mosher snap, the Anchor snap, and the Judd & Blakeslee snap of the Kempshall patent, were all new competitors, and this appears inferentially at least in the examination of the evidence. Moreover, the court below makes this finding as to the settled condition of the competition before defendants came into it, simply upon E. T. Fitch's *opinion* in that regard; for he says definitely, in answer to ×-Int 74, that he has no actual knowledge as to the vital point.

*Fitch's testimony before the Master* [*page* 59, *record*]:

×-Int. 74. Can you say from your own knowledge that the sales of snaps with swinging tongues, made and sold by manufactures other than defendants, did not have something to do with decreasing your sales of snaps, as you have testified?

Ans. I cannot.

G. COMPLAINANTS MAKE NO ATTEMPT TO APPORTION THE DAMAGES BETWEEN THE PATENTED PART AND THE ENTIRE SNAP HOOK. THE ENTIRE MARKET VALUE OF THE SNAP CAN NOT POSSIBLY BE DUE TO THE PATENTED IMPROVEMENT. The finding of the master and of the court below upon this point is, that the entire market value of complainants' patented snap is due to the presence therein of the improvement patented in and by the first claim of complainants' patent. Defendants contend that this position is clearly unsound.

Complainants' has two claims, to wit:

(1). The combination of the tongue *g*, with the spiral spring (figure 4) when the spring works on the torsion principle, and rests

in a recess (as *r*) in the rear end of the tongue, substantially as herein described.

(2). The combination of the fulcrum-pin *n* with the tongue *g*, when the pin *n*, is cast in one of the ears and the recess or cavity is fitted to be closed substantially as herein described.

*Earle's testimony, (compt's expert)* [*page* 12, *record*] :

Int. 3. Will you please state what the invention is which you find therein described, having reference to the state of the art in the manufacture of snap-hooks at the time of the issuing of said letters-patent, if you have any knowledge on that subject.

Ans. * * The first part of the invention of Bristol consisted in an improvement in the construction of the tongue by making the recess for the spring in one side of the tongue instead of upon the underside, whereby one of the cheeks on the tongue was dispensed with and the drilling of the pivot holes might be avoided, as in molding the Bristol tongue with the side recess, the pivot hole in the pattern would leave a core in the sand to form a pivot hole in the tongue, so that the coil of the spring would be introduced into the recess in the tongue at the side. The first claim of the patent is for a tongue constructed with the recess in the side, combined with a coil spring which rests in said recess, and operating between the body of the hook and the tongue, as I have described.

The second part of the improvement related to an improvement in the construction of the body of the hook whereby the drilling of the cheeks for the pivot, and the introduction of an independent pivot, was avoided. This improvement consisted in casting the cheeks of the shank spread from what was to be their condition in the complete hook, and with a stud or fulcrum-pin cast on one of the cheeks but not extending to the other, the length of the stud being no greater than the space between the cheeks when the hook is complete. The tongue having a transverse perforation corresponding to the stud or fulcrum-pin, was placed between the cheeks of the shank or body of the hook on to the fulcrum-pin and then the cheeks of the shank were pressed toward each other so as to retain the tongue upon the fulcrum pin. This improvement is the invention recited in the second claim."

Int. 4. Please look at the snap-hooks marked Complainants' Exhibit "Complainants' Snap-Hook," and say whether or not they correctly represent the improvements which you have described.

Ans. They do correctly represent the two improvements described and claimed in the Bristol patent, and which I have described in my last answer.

The court can readily see by its own observation that there are two distinct improvements described and claimed in complainants' patent in suit. One is the combination of the tongue and spring, which has been alone discussed so far, and the other is the obviously much more important improvement which enables complainants to dispense with an independent rivet and with the drilling of the rivet hole in the body of the hook. As complainants' expert truly says, both these improvements are present in complainants' snap hook as made under their patent and sold to the trade and to consumers. Clearly and beyond argument both of those improvements contribute to the mar-

ketable value of the snap. Quite as clearly, as it is believed, the second of these improvements is the much more important one; (no pretense is made that defendants' snap embodies this second and more important improvement.) Yet the claim of the complainants in the court below, and the finding of the court below, is that the entire market value of the complainants' snap is due to the presence therein of the minor improvement patented in and by the first claim, ignoring completely any value contributed by the second claim. Clearly upon this showing alone, the finding of the court below must fail.

But let us inquire more specifically into the breadth and real character of the improvement of Bristol's first claim

*Earle's testimony*, (*Compt's expert*) [*page* 14, *record*]:

×-Int. 7. What is the special advantage or utility consequent upon making such parts of a snap-hook as are referred to in the first clause of the claim in the patent sued on, in the manner described in the patent?

Ans. As I have before stated, it enables the tongue to be molded and cast easier than the previous construction of recessed tongue; it also permits the tongue to be cast with the pivot perforation formed in the process of casting whereby the drilling of the cheeks may be avoided; it also saves one of the cheeks or sides of the recess in the previous construction, hence less metal is used in the formation of the hook; again, in assembling the parts the spring if more conveniently arranged in its place in the recess than it can be done in the recess of the previous hook. By the previous hook or tongue, I mean the Judd patent to which I before referred.

× Int 9. Do you find in the complainants' exhibit, Old Snap-Hook, a combination of the tongue with the spiral spring where the spring works on the torsion principle and rests in a recess in the rear end of the tongue?

Ans. Broadly considered, yes; as I have before stated; but not the recess "*r*" of the patent.

×-Int. 10. What is the recess of the patent sued on?

Ans. It is a recess formed in one side of the head of the tongue, opening beneath the tongue to permit one arm of the spring to pass through so as to bear upon the body of the hook while the other end bears upon the tongue.

×-Int. 12. Does the recess of the complainants' patent mean a recess having an opening for the spring to project therefrom as described in complainants' patent?

Ans. The opening through which the spring projects is necessarily a part of the recess in the side of the tongue, but it is not the recess "*r*" unless it has that opening.

×-Int. 17. When the parts of complainants' exhibit, Old Snap-Hook, are assembled together in normal working order, and the parts of complainants' exhibit, Complainants' Snap-Hook, are assembled together in working order, do or do not the springs of both of them have ends taking their bearings one end upon the body of the hook and one end upon the tongue in substantially the same manner?

Ans Substantially the same; yes, sir.

×-Int. 18. Then the advantages incident to the construction described in the Bristol patent consist, do they not, substantially, as you look at the matter, in an advantage in the matter of casting and advantage in the matter of assembling the parts?

Ans. Yes, and in producing a hook of cheaper construction.

[*Page* 19, *record*]:

Int. 4. I infer, then, that if you agreed with Mr. Shepard in understanding the first claim of the patent to include any form of swinging tongue so mounted as to be capable of oscillation and having a spiral spring working on the torsional principle, and resting in a recess of any form, you would agree with him in his answer to Int. 4, in which he says he finds substantially the same combination in the exhibit "Hull Patent," and exhibit "Palmer & Simmons Patent," and the exhibit "Judd Patent of 1864." Is this inference correct?

Ans. It is, and that state of the art is what I endeavored to state in my previous examination, and as exhibited by the Judd patent; that is, complainants' exhibit "Old Snap Hook."

Int. 5. Mr. Shepard is asked by Int. 6: "Suppose a more limited construction of that first claim, wherein the *form* of the recess in the tongue shall be made essential, to wit, a combination of a tongue having a *side recess* with a torsional spring in such recess. Then is, or not, the combination found in any of the prior patents or exhibits made under them;" and he answers: "It is in the Hull patent and the exhibit made under it, also in the Palmer & Simmons patent and the exhibit made under it." Will you please state to what extent you agree with Mr. Shepard in his testimony on this point?

Ans. If the claim were to be construed as broadly for a tongue having a recess in its side, within which a torsional spring was arranged, then the Hull patent and Palmer & Simmons patent would show such a recess and spring: * *.

Extract from Judge Shipman's opinion on the merits:

"The defendants therefore desire to construe the claim to mean 'any form of swing hook so mounted as to be capable of oscillating and having a spiral spring working on the torsion principle and resting in a recess of any form in the rear end of the tongue.' Upon this construction the Judd patent of 1864, and other patents, would be anticipatory. * *

"The invention of Bristol was in two parts. The first part consisted in constructing the tongue with a recess upon one side, opening outward, through which one arm of the spring must project to bear upon the hook. In this recess the coil of the spring was placed. The advantages of this method of construction were those of economy of material and ease of manufacture."

It is clear from the above quotations, from the testimony of complainants' expert, and from the opinion of his honor, Judge Shipman, in deciding upon a question of infringing, that the improvement of the Bristol first claim is very slight in its nature, and has to be carefully distinguished from devices of the prior art in order to find any differences upon which patentability may be based. Let it be remem-

bered that complainants' expert specifically admits in his answer to ×-Int. 17 of the prima facie case just quoted, that when the two hooks are assembled in working order and for use, the Bristol patented snap and complainants' exhibit Old Snap are substantially the same in appearance and function. Moreover this clearly appears upon the most cursory examination of the two structures. Let it further be remembered that in testifying upon the merits of the case complainants' expert sets out the utility of the improvement of Bristol's first claim as having wholly to do with casting or assembling the parts, and that his honor, Judge Shipman, says specifically thereof: "The advantages of this method of construction were those of economy of material and ease of manufacture."

But in the face of this explicit testimony on complainants' part, and in the face of this explicit finding of the court below as to what constituted the utility inherent in the first claim of the Bristol patent, complainants, in trying the question of damages, abandoned this position entirely, claimed that the whole market value of the snap in the consumers' hands was due to the slight improvement of this first claim, and, more strange still, the circuit court allowed that pretense. Let us examine the evidence upon this point, in trying the question of damages.

*Fitch's testimony*, [*page* 54, *record*]:

Int. 14. In what feature of the patent does the value of the patented snap as a finished article reside? I mean the feature that gives it its market value over snap-hooks?

Ans. In the tongue.

[*Page* 59, *record*]: Cross-Examination.

×-Int. 75. Will you state fully, apropos of your 14th answer, how, "as a finished article," the peculiar and patented tongue of the Bristol snap gives the snap its market value; how, as a finished snap, does it differ in operation from Defendant's Exhibit Old Snap?

Ans. Without it the snap could have no commercial value. I am not familiar enough with the Exhibit Old Snap to tell how it differs; we have not it here.

×-Int. 76. Will you fully explain how a side recess in the tongue, opening outward, as in the tongue of the snap in the Bristol patent gives the snap, "as a finished article," its marketable value?

Ans. As I said before, it, the hook, has no value without the tongue.

×-Int. 77. The same is true of the Anchor snap, the Mosher snap, and the O. B. North & Co. snap, is it not?

Ans. It may be.

×-Int. 78. Do you mean by your last answer but one, the snap-hook is inoperative if the tongue be not present?

Ans. It is inoperative for its design and purpose, * *

×-Int. 79. The snap hook would also be inoperative for its design and purpose if the tongue and spring were present and the hook-body were absent, would it not?

Ans. I presume it would be.

× Int. 80. How then does the tongue of the snap of the Bristol patent give to the snap, "as a finished article," its marketable value, any more than the hook body gives that marketable value?

Ans. The value is contingent upon the presence of the combination, and the tongue is a key to it.

×-Int. 81. Can you give any reason, other than mere assertion, why the tongue of the snap of the Bristol patent gives any more marketable value to the snap, "as a finished article," or what you have been pleased to call the combination, than the hook-body does?

Ans. Its success in the market demonstrates it.

×-Int. 82 Did you ever sell the tongue separate in the market?

Ans. No, sir.

×-Int. 83. How then do you know what relative value the market gives the tongue, as regards the value it gives to the body-hook?

Ans. I do not suppose that separate there is any market value in either.

×-Int. 84. Do you know whether, in the same time, you have sold more or less of your Bristol snap than Judd & Blakeslee have of theirs?

Ans. I have no means of knowing.

×-Int. 85. Then what did you mean by your answer to the 14th question?

Ans. I mean what I said; that the tongue gives it its marketable value.

× Int. 86. As your 14th answer reads it is to the effect that the tongue in the snap of the Bristol patent gives to the snap, "as a finished article," its marketable value over other snap-hooks. In your 81st answer you say of your hook that "its success in the market demonstrates it," and in your 84th answer you say that you do not know what its success in the market, as compared with Judd & Blakeslee's, is. Can you now give any other reason for your answer to the 14th question than that it is based upon your opinion?

Ans. The question is somewhat involved, if you will repeat the question—(question repeated)—I cannot.

The attention of the court is directed, in the *first* place, to the point that Mr. Fitch attempts here to maintain not that the improvement of the first claim, which is a certain peculiar combination of the tongue and spring, gives the Bristol snap its marketable value over other snap hooks, but that the *tongue*, and the tongue alone, gives that marketable value. The attention of the court is directed, in the *second* place, to the point that Mr. Fitch is utterly unable to give any facts or reasons whatever to support his *opinion* that the marketable value of the Bristol snap resides in the tongue. But let us consider the remainder of complainants' testimony on this point.

*Earle's testimony on damages, [page 82, record]:*

Int. 1. Are you familiar with the Bristol patent of May 16, 1865?

Ans. I am.

Int. 2. Can you give any reason why the tongue of the snap-hook in that device gives any more marketable value to the snap as "a finished article" than the body-hook does?

(Objected to, that the answer would necessarily be a mere expression of opinion as the witness is not shown to know anything of the marketable value of snap-hooks; moreover, he has already testified fully to all matters relating to this tongue that came within his proper province, and further, that the evidence sought by the question is not rebuttal, and proper only at the opening of the case on this point.)

(Counsel for complainant replies to the objection by calling the attention of defendants' counsel that it is a mere repetition of the question put by him in his cross-examination of Mr. Fitch.)

Ans. The construction of the body of the hook, which is the subject of the second claim of the patent, relates only to the method of putting the parts together. So soon as the parts are together the body of the hook has no peculiar advantages to add to its marketable value over any former hooks; that is to say, such as employed a wire pivot introduced through the body of the hook upon which the tongue would turn. The peculiar construction of the tongue does possess advantages over any previous tongue adding to the value of the hook as a merchantable article. The recess formed in the side of the hook offers freer and better play for the spring than the previous construction of the tongue.

Cross-Examination.

×-Int 7. How long have you been solicitor of patents?

Ans. Thirty years.

×-Int. 8. In all of that time have you ever been employed in the manufacture and sale of snap-hooks?

Ans. No, sir.

×-Int. 9. How many users of the Bristol snap did you ever hear say that they bought such snap or prefered it because of its peculiar tongue?

Ans. Don't know that any person ever bought a Bristol snap besides myself of my own knowledge.

×-Int. 10. Then you never heard any person say so?

Ans. No, sir.

×-Int. 11. What do you mean by the merchantable value of a snap?

Ans. I mean the value which it has to me in the snap as I purchase it myself in preference to all others.

×-Int. 12. Have you used all others?

Ans. There are very few snaps that I have not seen or examined and a large number that I have used experimentally.

×-Int. 13. Then when you use the phrase "marketable value," or answer that phrase, you refer to such part of the market demand as has been created by your one. Is that so?

Ans. I refer to my opinions formed from my own use and to what I have heard others say in regard to the snap.

(Objected to so much of the answer as is hearsay.)

×-Int. 14. The spring of the Bristol snap is the same in construction and operation substantially as the spring of complainants' "Old Snap?"

Ans. Substantially.

×-Int. 15. In both snaps mentioned in my last question one end of the spring bears against the tongue and the other against the body of the snap, does it not?

Ans. Yes, sir.

×-Int. 16. In both of them the spring is arranged substantially at right angles to the pivot-pin, is it not?

Ans. Yes, sir.

× Int. 27. In your second answer you say, "So soon as the parts are together the body of the hook has no particular advantages to add to its marketable value over any former hooks." Complainants' hook-body in the assembled article performs the same functions substantially as the body in prior snaps, does it not?

Ans. It does as I understand the question.

×-Int. 28. And has substantially the same marketable value, has it not, so far as you know?

Ans. I think it has.

This testimony, too, utterly fails to present anything in the nature of *fact* to support the proposition that the entire marketable value of complainants' patented snap is due to that slight improvement residing in the first claim of the patent. Moreover, this testimony is utterly opposed to that given by this same witness in testifying with regard to infringement as to the utility of the device of this first claim, The truth of the matter is particularly and concisely stated in the following:—

*Bragg's testimony on damages, [page 68, record]:*

Int. 7. Does the trade, or do consumers or users of snaps, make any inquiry or distinction as to the manner of hanging the tongue in those snaps having a swinging tongue?

Ans. They do not; except that they do not consider a snap with a detachable rivet as similar to one that has not.

TO RECAPITULATE:

A. A genuine decrease in complainants' 1880 sales is not satisfactorily established.

B. Defendants' sales could not have been the whole cause of the decrease in complainants' 1880 sales, for the whole of that decrease was 2,781 gross, while defendants' 1880 sales of snaps of all kinds, infringing and otherwise, was only 2,118 gross (a difference of 95,472 snaps) and, so far as the evidence shows, only 1,412 gross (or about one-half of defendants' decrease) could have gone to complainants' previous customers.

C. The Circuit Court based its finding on this point solely upon the *opinion* of E. T. Fitch, the principal complainant in this case. Such base is untenable.

> *Especially because* complainants practically admit that in the infringing period they sold to their customers—who were in that year also customers of defendants—as many as or even more snaps than complainants were accustomed to sell to such customers. This is a fatal weakness in complainants' showing.

D. Complainants' new snap of 1880 must have had an influence in decreasing their sales.

E. Complainants' increase in price in the latter part of 1879 must have had an influence in decreasing complainants' 1880 sales.

F. Defendants' snap was only one of eight competing with complainants. Defendants' entire sales were only about one-fourth of complainants'. The other seven competing snaps must have had an influence in decreasing complainants' 1880 sales, particularly in view of the fact that complainants increased their price in the latter part of 1879, and attempted to substitute a new form of snap in 1880.

G. The entire market value of complainants' snap can not be attributed to the slight improvement of the first claim of complainants' patent, for—

1. Complainants' snap embodies the improvement of both claims. The latter is the more important. The second claim can not be ignored in this way.

2. At the trial on the merits, fine discrimination was necessary to distinguish the device of the first claim from the prior art; it was testified by complainants' expert and found by the Circuit Court that "The advantages of this method of construction were those of economy of material and ease of

manufacture." Those advantages are *manufacturing* advantages; they contribute nothing to *market value*. That is true, and not ten men in the consumers of the 13,000,000 of complainants' snaps know anything whatever of any practical difference between Complainants' Exhibit Old Snap and the Bristol snap.

3. The only evidence that complainants produce in support of this claim consists of the *opinion* of E. T. Fitch and his hired expert, Mr. Earle, shown, in cross-examination, to have no basis of fact.

Wm Edgar Simonds
Complainant's Counsel

# Supreme Court of the United States,

OCTOBER TERM, 1886.

**No. 122.**

ANDREW N. BRAGG AND ROBERT H. SMITH, CO-PARTNERS, UNDER THE NAME OF A. N. BRAGG & COMPANY,
*Appellants,*

*vs.*

ELEAZER T. FITCH AND EMILY M. FITCH, CO-PARTNERS, UNDER THE NAME OF W. & E. T. FITCH.

**Appeal from the Circuit Court of the United States for the District of Connecticut.**

## BRIEF OF APPELLEES.

JOHN S. BEACH,
*Counsel for Appellees.*

Hoggson & Robinson, Law Printers.

# Supreme Court of the United States,

OCTOBER TERM, 1886.

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ANDREW N. BRAGG AND ROBERT H. SMITH, CO-PARTNERS, UNDER THE NAME OF A. N. BRAGG & COMPANY, *Appellants*,

*vs.*

ELEAZER T. FITCH AND EMILY M. FITCH, CO-PARTNERS, UNDER THE NAME OF W. & E. T. FITCH.

**Appeal from the Circuit Court of the United States for the District of Connecticut.**

## BRIEF OF APPELLEES.

## STATEMENT.

The suit is brought upon an original patent granted to Chas. B. Bristol, May 16, 1865, for an "Improved Snap-hook."

The invention relates to a class of hooks in which the tongue is pivoted in a recess between the two cheeks of the shank.

The state of the art prior to the Bristol invention is well shown in appellees' exhibit "Old Snap-hook," in which a channel formed on the under side of the tongue between its two projecting cheeks serves as the recess in which the spring rests.

The features of the Bristol invention now in controversy, are embodied in the first claim.

> "What I claim as my invention, and desire to secure by Letters Patent, is the combination of the tongue, *g*, with the spiral spring (Fig. 4), when the spring works on the torsion principle and rests in a recess (as *r*) in the rear end of the tongue, substantially as herein described."

The main feature of this claim consists in making a recess for the spring in one side of the tongue, by which arrangement (among other good results), one of the cheeks is dispensed with, and provision is made for the escape of dirt and foreign matter, so that the hook thus made "is not only cheaper in consequence of the peculiar recess of the appellees' patent, but is better than the old snap-hook on which it is an improvement."

Record, p. 17, fol. 36.

The appellees became assignees of the patent November 30, 1865, and soon began their manufacture. This

improved snap so far took control of the market that the sales up to December, 1880, had amounted to thirteen millions.

Record, p. 14, fol. 32.

Shortly before the bringing of this suit the appellants made and put upon the market and sold snap-hooks which it is agreed are correctly represented by Exhibit "Defendants' Snap-hook."

Record, p. 11, fol. 28.

It will be noticed that the parties are not at issue upon any question of fact. The issue is purely a question of law, and involves simply the proper construction of this patent.

It is quite true that it often happens in cases where the defendant sets up want of novelty and denies infringement, very complicated questions of fact are in controversy; not so here.

As to novelty—

The appellants' expert construes this patent as follows:

> "I fail to find any limitation either in the specification or in the first claim to the combination referred to therein, except that the spring shall work on the torsion principle and rest in a recess in the rear of the tongue. Any form of swinging hook so mounted as to be capable of oscillation, and having a spiral spring working on the torsion principle

and resting in a recess of any form, in the rear end of the tongue, would, in my opinion, be the thing or invention described in the patent and specially referred to in the first claim."

Record, p. 25, fol. 48.

If the Court agrees with the appellants' expert in this construction, it is admitted by the appellees that the defense of want of novelty is established.

And so upon infringement—

It is all plain sailing as far as the facts carry us.

"Complainants' counsel also puts in evidence Snap-Hook marked Complainants' Exhibit "Defendants' Sample," J. B. M., N. P.

[It is agreed that this last Exhibit correctly represents a class of Snap-Hooks made and sold by the defendants after the issuing of said Letters Patent, and before the bringing of this suit.]"

Record, p. 11, fol. 28.

But here again the appellants' counsel seeks by a short tack to steer clear of infringement by construing the patent and the first claim thereof to include as part of the combination, a pivot-pin cast upon the shank as distinguished from a pivot-pin inserted through a drilled hole.

If they are right in this construction then clearly there

is no infringement, and if they are wrong then just as clearly is the appellant's hook an infringement.

And so also as to the minor defense that the combination shown is a mere aggregation. It is not otherwise urged except in connection with the claim that the patent must in its construction be limited to the shape of the recess, and the argument is, that as "the shape of the recess in nowise affects the operation of the spring," a mere aggregation results.

The sole question, therefore, is as to the true construction of the patent, for upon this point hinges the validity of the patent, and the issue of infringement.

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## APPELLEES' POINTS.

### FIRST POINT.

Upon its true construction this is a valid patent.

### I.

The record discloses that many men before Bristol had made snap-hooks. Many men before him had made snap-hooks having in combination a shank and tongue and spring. Prior to his invention, snap-hooks had been made with these three elements in such combination as

that the spring was inserted on the bottom of a channel formed between the two cheeks of the shank, and enclosed between the two cheeks of the tongue.

See Complainants' Exhibit, "Old Snap-Hook."

But the record also discloses that Mr. Bristol was the first man who ever combined the shank, tongue, and spring of a snap-hook in such relation to each other that a recess was formed in the side of one of the cheeks of the tongue, in which recess, rested a spring to actuate the snapping tongue.

## II.

The appellants do not deny this, but they say although Bristol's invention was, in fact, for a combination, one feature of which was a tongue having a recess upon its side as shown in the drawings and model, yet the patent may by expert ingenuity be so construed as to cover,

> "Any form of swinging hook so mounted as to be capable of oscillation and having a spiral spring working on the torsion principle and resting in a *recess of any form in the rear end of the tongue.*"

Record, page 25, folio 48.

Because

"The claim does not refer to this particular recess only by way of example, it cites a recess ("as *r*") from which I understand that the recess "*r*" is one of the many that may be employed in order to come within the requirements of the claim."

Record, p. 24, fol. 48.

## III.

This construction is not admissible.

1st. There is a presumption of law against a construction which will defeat the patent if it fairly admits of one sustaining it.

Adair *vs.* Thayer, 4 Fed Rep., 442:

"The patent is a grant, and is to be fairly and liberally construed in favor of the grantee and to effectuate the intent of the parties to it. This is the settled doctrine in this country."

Corn Planter Patent, 23 Wall, 226:

"The court will give a favorable construction to sustain the patent if it can fairly be done."

Ames *vs.* Howard, 1 Sumner, 485:

per Story J:

"Patentees rights are not to be frittered away upon formal or subtle objections of a purely technical character.

If the court can clearly see what is the nature and extent of his claim by a reasonable use of the means of intrepretation of the language used, then the plaintiff is entitled to the benefit of it, however improperly or inartificially he may have expressed himself."

The Circuit Court held:

"The defendants desire to construe the claim to mean 'any form of swinging hook so mounted as to be capable of oscillating, and having a spiral spring working on the torsion principle and resting in a recess of any form in the rear end of the tongue.' Upon this construction the Judd patent of 1864 and other patents would be anticipatory.

The claim was rather loosely drawn, and did not describe the recess as definitely as it perhaps ought to have done, but the plaintiffs have refrained from seeking a reissue and have preferred to trust their patent to the well-known liberal rules of construction which have been adopted by the Courts of this country, and which seek to give the owner of the patent his actual invention, if such favorable construction can fairly be made.

The state of the art shows that the placing a spring to actuate the tongue in the recess, *r*, at the side of the tongue, was the distinctive feature of Bristol's invention, and was an improvement upon the Judd hook in which 'the spring was inserted in the bottom of a channel formed between the two cheeks of the shank and enclosed between the two cheeks of the tongue.'"

The rule of construction is clearly stated by Judge Shepley in *Esterbrook* vs. *Dunbar*, 10 Off. Gaz., 909:

After saying that technical claims are to be construed with reference to the state of the art, so as to limit the patentee to and give him the full benefit of the invention he has made, the learned Judge says: 'The general terms and sometimes special words in the claims must receive such a construction as may enlarge or contract the scope of the claim so as to uphold that invention, and only that inven-

tion, which the patentee has actually made and described, when such construction is not absolutely inconsistent with the language of the claim.'

Under this rule the first claim is for a tongue constructed with a recess in its side, opening outward, combined with a coiled spring, which rests in such recess and operates between the body of the hook and its tongue."

Record, p. 31, fol. 60.

We submit that a fair construction of this description and claim as illustrated by the drawings, does not sustain the appellants' theory.

"That this recess '*r*' is cited only by way of example and as one of the many that may be employed in order to come within the requirements of the claim."

The whole structure involves as one of its essential features the recess in the side of the tongue as shown at "*r*" on fig. 3 of the drawing. No suggestion of any other recess for the spring to rest in, can be found. *This* recess can be found and just as easily whether designated as being "*r*," "at *r*," "as at *r*," or "as *r*." Under either designation we look for it in figure 3, and find the same recess in the same spot every time.

## SECOND POINT.

The snap-hook of the appellants is an infringement of the exclusive rights of the patent under the first claim thereof.

## I.

It is evident on inspection.

## II.

It is proved and not denied that "in hooks of the same size, the tongues, springs and bodies are interchangeable in the complainants' and defendants' hooks."

Record, p, 22, fol. 43.

## III.

The appellants' expert points out two features in which the appellants' hook "is unlike the Bristol patent."

1st. In the shape of its recess.

2d. In that only one of the ends of the spring points towards the hook.

The expert does not say that the appellants' hook is *enough* unlike to escape infringement.

It would hardly do, to put upon record an opinion including the old Judd hook within the claim of the patent, and record upon the same page an opinion by the same expert excluding the appellants' hook from the claim.

Besides, it is quite clear that there is no substantial difference in the shape of the recess in the two tongues, and that although one arm in appellants' hook is not bent quite so far around as in appellees' hook, yet in both, one arm of the spring extending through the opening in the recess takes its seat on the body of the hook, and the other arm takes its seat at a point where it acts against the arm resting on the body. The resulting resistance forces the tongue into its closed position.

This resulting resistance is identical in origin, quantity and quality, whether the ends of the two arms point in the same or in a different direction. And therefore it is, that in appellees' and appellants' hooks of the same size, the recessed tongues and spiral springs of each are interchangeable.

The Circuit Court on this point rightly held:

> "The defendants' hook has substantially the plaintiffs' recess. It differs somewhat in shape, and both ends of the spring do not project forward toward the hook, but the recess has the heretofore described distinctive features of the first part of the invention. It is useless to say, because the defendants do not have the precise shape of the recess, or because both ends of the spring do not point the same way, therefore the first claim is not infringed. * * * * * Without examining in detail all the objections which are urged in the elaborate brief of defendants' counsel against the charge of infringement, it is sufficient to say that infringement of the first claim is the result of the construction which has been given to that claim."

Record pp. 3 and 32, folios 59, 62.

## IV.

It is said by the appellants that the claim infringed upon, contains no patentable invention, for the reason that "the parts mentioned therein, are alone and of themselves inoperative."

1st. It is not requisite or proper in an improvement of this character consisting of two parts each involving a new combination of mechanism adapted to perform its ap propriate function, that the entire invention should be compressed into a single claim, so as to include therein the tongue constructed with the recess in the side combined with a coil spring which rests in said recess, and operating between the body of the hook and the tongue as set forth in the first claim, and *also* the improvement in the body of the hook whereby the drilling of the cheeks for the pivot and the introduction of an independent pivot was avoided, as set forth in the second claim.

It is the office of the specification, not of the claim, to describe the invention in such "full, clear, and exact terms," as to enable others to make and use the same.

The fallacy wh.ch underlies the appellants' theory is that it assumes the duty of a claim to be to re-describe the invention as set forth in the specification of description. This is not so. The office and duty of the specification of claims are, to limit and define the extent of the exclusive rights of the patentee in the thing invented, not to re-describe it in detail.

If in a saw-mill, an inventor should construct new mechanism to perform the operation of sawing; and new and distinct mechanism to regulate the approach of the log to the saw; and still another combination to adjust the log so that each board should be of equal thickness: and if each of these distinct functions involved new and patentable combinations, he might well have a distinct claim for each. But upon the appellants' theory each would be inoperative and void; because the first would not show how the log was to be moved toward the saw, the second would not show how the saw was to be operated, and the third would be open to the objection that it did not disclose how the saw was to be operated or the log moved.

The Circuit Court correctly disposed of this objection:

> "The defendants also insist that the claim, if so construed, is invalid, because if the invention consisted in a combination of a tongue having a peculiar recess with a spring, the form of recess does not affect the spring, and consequently the claim is for a mere aggregation of parts.
>
> There must be a combination of spring and tongue, and the spring must be placed where it can actuate the tongue. The old location was in a channel formed between the two cheeks of the tongue. The location was objectionable, not because the spring did not cause the tongue to snap easily, but because another location would be more economical, and would keep the hook more free from dirt. The new combination was of spring and recessed tongue, the recess being so constructed that by means of the new location of the spring, a new and beneficial result was attained. It is not

material whether the benefit was to the spring or not, but it is material that the benefit should be the result of the new combination. The combination in this case does not fall within the principle of Hailes *vs.* Warner, 20 Wall, 353, which condemns a combination creating no new effect as its results."

Record, p, 32, fol. 62.

## THIRD POINT.

The appellants' exceptions to the Master's report are not valid and were properly overuled.

### I.

The appellants' exceptions are eleven in number, and are of four classes:

1st. Those relating to claimed errors in the finding as to the number of gross of infringing snaps made and sold by the appellants.

2d. Those relating to claimed errors in the finding as to the amount of damages sustained by the appellees through the enforced reduction in the price of the appellees' goods, by reason of the competiton of the appellants.

3d. Those relating to the claimed errors in the finding as to damages sustained by the appellees, through loss of profits they would have made by the sale of their snaps, if

the infringing snaps of the appellants had not been on the market.

4th. Those relating to the claim that the Master erred in making no apportionment of the reduction of price between the patented and unpatented parts of the snap-hook.

## II.

As to the first class, it is alleged for error,

> "that the Master found the number of infringing snap-hooks to be 3,667¼ gross, when he should have found that the same did not exceed 3,000 gross."
>
> Record, p. 86, fol. 217.

Upon this point, the Master had before him two Exhibits, as follows:

"CAUTION.

OFFICE OF W. & E. T. FITCH,

NEW HAVEN, CONN., Dec. 17, 1879.

*Gentlemen:*

We learn that Messrs. A. N. Bragg & Co., of Pine Meadow, Ct., are offering for sale Harness Snaps which closely resemble and so *manifestly infringe Bristol's Patent Snap*, that we hereby caution you against dealing in the same. We shall, in all cases, protect our rights under the Bristol patent.

Respectfully,

W. & E. T. FITCH."

"*Gentlemen:*

In reply to the above circular of Messrs. W. & E. T. Fitch, we hereby assure our customers that the harness snaps manufactured by us *are not an infringement* of the "Bristol Patent," but are manufactured under a patent owned by ourselves, and we are able and will defend ourselves and our customers from the "Bristol Patent" or any other.

As to our ability to do so, we refer to the commercial reports or any reliable business firms in our vicinity.

A. N. BRAGG & CO.

Pine Meadow, Ct., Jan. 10, 1880.

A. N. BRAGG,
R. R. SMITH."

Record, p. 39, fol. 80.

At the first hearing before the Master, Mr. Bragg was asked (Int. 67) if he would produce,

> "at the next hearing a copy from your books of the list of sales of New York snaps during this period, giving when you can, the date of purchase, the name of the purchaser, the quantity sold, and the prices at which they were sold."

His reply was "No, sir," and the ostensible reason assigned was,

> "We object to giving our competitors any information that might result in any way to the disadvantage of our customers."

Record, p. 46, fol. 102.

The Master then groped his way as best he could, and his finding on this subject is:

"The defendants commenced the manufacture of snap-hooks that infringed the plaintiffs' exclusive rights, about the 1st of October, 1879, and ceased to do so about the 20th of September, 1881. During that time, they manufactured and sold according to their exhibit "list of sales" 3,667¼ gross of snap-hooks with swinging tongues. I have been embarrassed in ascertaining how many snap-hooks with a side recess in a swinging tongue, were made during this period, owing to the fact that the different styles or patterns of hooks, made and sold by the defendants, were not distinguishable upon their books. It is difficult to see why this was not done, especially as the defendants had early notice that the plaintiffs considered them infringers. The defendant Bragg put the number of snap-hooks having a side recess in a swinging tongue, at 3,000 gross; but stated positively that there was no way to distinguish the different styles of snaps made by them. *He did not seem to be at all times actuated by an earnest desire to forward the purpose of the enquiry*, and after carefully considering all the testimony bearing upon this branch of the case, I find that the defendants made and sold during the period above named, 3,667¼ gross of snap-hooks having a side recess in a swinging tongue, in violation of the plaintiffs' exclusive rights under the first claim of the Bristol Patent."

Record, p. 35, fol. 70.

## III.

The second class of exceptions alleged for error.

"The Master erred in reporting that the complainants have suffered damage by the unlawful acts of the defendants, through the enforced reduction in the selling price of complainants' patented snaps, owing to defendants' competition by selling the infringing snap-hooks; when the Master should have found that no such reduction of prices was caused by defendants' acts."

And in not reporting that

> "the Judd & Blakeslee's snap, the O. B. North & Co.'s snap (No. 1 and 2), and complainants' exhibit old snap, were all sold in the market of the United States, in competition with complainants' patented snaps, * * and had effect in decreasing the sales of complainants' patented snaps. * * Also that there is no evidence in this case other than that which is matter of opinion, that the sales of infringing snaps by defendants, had any effect in decreasing the sales of complainants' patented snaps."

Record, p. 87, fol. 219.

These were issues of fact upon which the conclusion of the Master is:

> "I do not find that the presence of any of those snaps in the market, during the infringing period, had a sensible effect in reducing the plaintiffs' sales."

> "On the other hand I do find that a sufficient operative cause for such decrease in sales existed in the competition of the defendants' infringing snaps."

Record, p. 36, fol. 73.

## IV.

The third class of exceptions, which relate to alleged errors of the Master in estimating damages to the appellees from the loss of profits that they would have made by the sale of their snaps if the infringing snaps of the appel-

lant had not been put on the market, have no foundation in fact.

The Master found that such damages existed, but he also found and reported that

> "the testimony as to cost of manufacture and sale is so meagre and indefinite, that I am unable to make any finding as to the extent of the plaintiffs' damages from the loss of profits they would have made if allowed to retain and supply the market of which they were deprived by the unlawful acts of the defendants."

Record, p. 38, fol. 77.

## V.

The fourth class of exceptions claiming error is, that the Master did not apportion the reduction of price between the patented and unpatented features of the snap-hook.

FIRST. In this case no such apportionment was demanded.

The dominant feature in the patented hook which enables it to command the market, is its peculiar tongue. It is true the hook has other peculiarities of fabrication, which enables it to be made more economically than other hooks. But when made and sent into the market as a finished article, for sale, its advantages as a marketable snap over other snaps are due to its peculiarity of tongue. This economy of fabrication may add to the ap-

pellees' profits, but it adds in precisely the same way, and for the same reason, as if they bought their material in a cheaper market, or having a larger capital bought for cash, instead of on credit. Such elements are not entitled to an apportionment of any part of the damages caused by a reduction of prices on a patented article of manufacture.

And the appellees insist the law is so, that upon a claim for damages resulting from an enforced reduction in price, if the patented device is, not a mere subordinate appendage, but is a dominating feature, the mere fact that the structure in which it is embodied, contains parts, other than the patented device, will not avail the appellant.

In such case, if the plaintiff can satisfy the Court as to the amount of the enforced reduction, and that it was caused by the defendants' competition, "it seems plain," says Judge Blatchford, in *Sargent* vs. *Yale Lock Company*, 17 *Blatchford*, 244, "that the defendants' infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices."

In that case the defendants made the same claim as is here made.

The patent being for a "turning bolt" in a safe lock, they insisted—

> "That the plaintiff is not entitled to recover the entire amount of reduction enforced by the defendants' competition, but only damages occasioned by the effect of the presence of the infringement; that the burden of proof is on the plaintiff to fix the value, and to separate the effect of the infringing devices, that he has failed to do so by any proper proof; and that no basis was afforded to the Master on which such damage could be computed."

But as we have above quoted, the Court overruled this claim, and for the reason—

> "That the essential feature of the locks [the snap-hooks], was the turning bolt device, [the swinging tongue device of side recess and spring], and an essential feature of the infringing locks [snap-hooks], was the infringing turning bolt [tongue] device. And as the plaintiff could not sell his turning bolt [tongue] device, unless it was embodied in a lock [hook], and as he was thereby enabled to make his profit on the entire lock [snap-hook], and as he was deprived by the acts of the defendants from selling at low prices, locks [snap-hooks], containing the patented turning bolt, [swinging tongue] device, of the profit he would otherwise have made on the locks [snap-hooks], he actually sold containing the turning bolt [swinging tongue] device, it seems plain that the defendants' infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices."

The authority relied upon by the appellants under this class of exceptions is *Ingersoll* vs. *Musgrove*, 14 Blatchford, 543.

Judge Blatchford was not satisfied with the report of the Master in that case and for good reason. The Master did not report how much the reduction of price was, or when it was made, or how much of it was due to the fact

that the infringing articles contained the patented feature of the plaintiff's patented cuspadore. These, the Judge says, were all "questions of fact," and he would not accept the wild guess of the Master that a certain percentage of damage, "occasioned by the infringements by the defendants and other parties," belonged to the defendants to pay.

In the case at bar the Master finds—and we submit that the evidence not only justifies, but extorts such finding.

1st. The precise amount of the reduction actually made, and when it was made.

2d. That such reduction was wholly due to the appellants' competition.

3d. That the sole cause of the appellants' successful competition was because the infringing snap had "the characteristic feature of the plaintiff's snap as a finished article, by which it acquired its position in the market," and that it was by reason of the infringing snaps possessing this feature, that "they came into direct competition with those of the plaintiff's."

The Circuit Court in overruling this class of exceptions followed the decision of Judge Blatchford in *Sargent* vs. *Yale Lock Co.:*

> "But the defendants further say that the device is composed of an unpatented hook and a swinging tongue, and that the enforced reduction in price was fully as much upon the hook as upon the tongue, whereas the Master gave the

entire reduction as damages, when it was the duty of the plaintiffs to prove, and of the Master to find, if a sufficient basis was furnished for the finding, how much of the damage was due to the infringement of the patented part.

While it is not true that the tongue is the whole of the device, or that the hook is not an indispensable part of it, yet the tongue is the peculiar, and variable and, as has been said, essential feature in all snap-hooks of this class, and the hook is the unvarying feature to which the tongue is attached. Both together constitute a snap-hook, and the patented tongue must, in connection with an unpatented hook, be placed in the form of a snap-hook for sale. This state of facts brings the case within the principle which is stated in Sargent *vs.* Yale Lock Mfg. Co. [17 Blatch., C. C. R., 244], and which is, that when reduction of prices in the plaintiffs' sales is the only element of damages, if the essential feature of the plaintiffs' structure, and of the infringing structure, respectively, is the patented device, and the patented device being only a part of the structure, must necessarily be embodied in the complete structure for sale, and he is enabled by the presence of such patented device to make his profit on the entire structure, and he is deprived by the acts of the defendant, in selling at low prices infringing structures containing the patented device, of the profit which he otherwise would have made on the structures containing the patented device which he actually sold, "it seems plain that the defendants' infringement must be held to have caused the entire loss of the plaintiff by the reduction in prices, after allowing a proper sum for any other patented device contained in the defendants' structures," "and for any other cause which gave to the defendant an advantage in selling his structures."

Record, p. 91, fol. 233.

The recent affirmance of the decision of Judge Blatchford in *Sargent* vs. *Yale Lock Co.* [117 U. S., 536], demon-